A Consultation on the Draft
Privacy of Personal Information Act, 2002

Proposed by the
Ministry of Consumer and Business Services

This draft of legislation is intended to facilitate consultation concerning its contents.

The proposals will only become law if passed by the Legislative Assembly.

Consultation on the Draft Ontario Privacy Legislation

Introduction:

Protecting the privacy of personal information is a top priority for the Ontario Government. As part of our commitment, the government has developed draft legislation that would set clear rules to protect information privacy, based on internationally accepted principles.

The Ministry of Consumer and Business Services (MCBS) is seeking your input on this draft privacy legislation that it has developed in conjunction with the Ministry of Health and Long-Term Care (MOHLTC).

Our goal is to create comprehensive privacy legislation that gives the people of Ontario confidence that their personal information is protected when dealing with businesses, other non-governmental organizations and the health sector.

It is important for the government to strike the right balance between an individual's right to control how their personal information is used with the needs of organizations to use personal information for purposes that are reasonable and appropriate.

Why introduce privacy legislation at this time?

Ontario is committed to introducing comprehensive privacy legislation that will protect the personal information of individuals and propel Ontario to the forefront of the digital economy. There is clear public expectation and support for provincial privacy legislation. In the absence of Ontario privacy legislation, provincial organizations will be required to comply with federal rules in 2004. The federal *Personal Information Protection and Electronic Documents Act* (PIPEDA) came into force in January 2001. By January 2004, the Act will apply to all commercial activities within the provinces unless a province passes its own "substantially similar" legislation.

Ontario intends to go beyond the federal legislation in the following ways:

1. The federal legislation applies to commercial activities. Ontario's privacy legislation would include all activities and organizations not federally regulated and not covered by the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* (the provincial public sector privacy legislation).

2. Under the federal legislation, health information is protected through general application of the Act. The Ontario law would include provisions specific to health information privacy that recognize the unique needs of the health sector and the particular sensitivity of health information.

3. The Canadian Standards Association *Model Code for the Protection of Personal Information* is appended as a schedule to the federal legislation. The Ontario legislation would incorporate these privacy principles directly into the provisions of the law, setting out specific rights and obligations.

Past Consultations:

The province has had a number of opportunities to assess support for privacy legislation. MOHLTC engaged in public consultations on health privacy legislation from 1996 to 1998 and again in the fall of 2000. The consultation results showed strong support for consistent and comprehensive rules currently lacking in many health settings, where personal health information is collected, used and disclosed.

On December 7, 2000 the Minister of Health and Long-Term Care introduced Bill 159, the Ontario *Personal Health Information Privacy Act*. The public, and many stakeholders, expressed some concern about the Bill, particularly its provisions allowing uses and disclosures of personal health information within the health system, including to the Minister of Health and Long-Term Care, without the express consent of individuals.

Consultations on proposals for private sector privacy legislation were conducted by MCBS during the summer of 2000. Consultation responses were strongly supportive of a principle-based privacy law with broad application and a "made in Ontario" approach.

The Ontario government has decided to proceed with a balanced, integrated approach to privacy protection through the development of one comprehensive framework that addresses various sectors. This will provide Ontarians working in different areas with one point of reference for determining what their rights and obligations are regarding the privacy of personal information.

Contents of the Draft Bill:

The draft legislation presented here takes into account responses from the public received during previous consultations. The draft bill is intended to apply to the private sector, the health sector (including health care practitioners, services, agencies and institutions, including MOHLTC), and other organizations that are not covered by the provincial public sector privacy legislation, such as hospitals, schools and universities. The proposed bill will also apply to non-governmental organizations such as charities, professional associations and religious groups.

Producing a bill that speaks to the needs of small and large organizations, and a variety of industries and sectors has been challenging. The Ministry recognizes that specifically addressing the unique needs of the health sector has made the draft bill complex.

The draft legislation contains both general provisions and provisions particular to the health sector. The organizations that operate in the health sector are called "health information custodians". The rules governing these health-related organizations have received extensive input from MOHLTC and key health stakeholders. The general sections apply to all organizations that are handling personal information. Note that the general rules apply to personal health information held by organizations that are not part of the health sector (for example, insurance companies and employers in general). The general rules also apply to health information custodians when they are not acting in their health care capacity (for example, hospitals acting as employers with employee records).

This Bill must be introduced in the Legislature and passed before it can have the force of law. MCBS would like to give organizations a period of at least six months after the Bill is passed to comply with the Ontario privacy legislation before it comes into force. The goal is to ensure that the legislation comes into force prior to January 2004, when the federal privacy law would otherwise apply to all commercial organizations in Ontario.

This Consultation Process:

All stakeholders are encouraged to participate in this consultative process. We welcome your feedback and input on our proposed privacy legislation.

You will find explanations of certain issues and specific questions throughout the text of the draft legislation for your consideration. In addition, we would appreciate your input on the following general questions that apply to the overall format and content of the draft Bill.

General Questions:

1. Stakeholders have expressed strong demand for a single, comprehensive privacy regime in Ontario. However, combining general rules and health-specific rules for privacy protection has made the legislation complex. How can the Ontario government simplify the draft privacy legislation and continue to have it apply to all sectors, including the health sector?

2. In this consultation draft, the Ministry has tried to strike the right balance between protecting individual privacy rights, and allowing organizations to use personal information for purposes that are reasonable and appropriate. Given the broad scope of this legislation and the number of activities involving personal information, it was not possible to foresee all the instances in which privacy rights and organizational needs may intersect. Has MCBS found the right balance between individual privacy protection and the reasonable needs of organizations in Ontario? How might the legislation be improved in this respect?

Written comments and submissions should be sent, no later than March 8th, 2002, to:

Policy Branch
Ministry of Consumer and Business Services
250 Yonge St., 35th Floor
Toronto, ON M5B 2N5
Fax: 416-326-8885
E-mail: privacy2002@cbs.gov.on.ca

The Ministry of Consumer and Business Services has been directed to consult with stakeholders regarding privacy law. Any personal information you provide is subject to the *Freedom of Information and Protection of Privacy Act*. The information will be used to assist us in conducting and evaluating the results of the consultation. This may involve disclosing your comments to other participants, institutions, and interested parties, during and after consultation. Your name will not be disclosed without your consent. You will not be placed on any other mailing lists. If you have any questions about the collection of this information, please contact the Freedom of Information and Privacy Office, Ministry of Consumer and Business Services at (416) 326-8470, email: Lynne.gottschling@cbs.gov.on.ca

Privacy of Personal Information Act, 2002

EXPLANATORY NOTE

To be prepared later.

Location of Questions in the Draft Ontario Privacy Legislation

1. Questions about the Definitions (end of section 2, p.15)
2. Non-Application of the Act (section 7, p.19)
3. Personal Health Information outside the Health Sector (section 8(1), p.22)
4. Situations Where Consent May Not Be Withdrawn (after section 12 (2), p.27)
5. Substitute Decision Makers (before section 14, p.28)
6. Consent for Collecting Health Information in the Health Sector (after section 19 (2). p.35)
7. Fundraising (after section 26, P.38)
8. Exemptions to Consent for Collection, Use and Disclosure (before section 33, p.40)
9. Personal Mental Health Information in Proceedings (before section 42, p.52)
10. Disclosure of Health Information in the Health Sector for Research (section 45, p.57)
11. Disclosures to the Minister of Health and Long –Term Care (before section 47, p.62)
12. Genetic Information (before section 54, p.71)
13. Procedures for Access (before section 56(1), p.73)
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An Act to govern the privacy of personal information

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Her Majesty, by and with the advice and consent of the Legislative Assembly of the Province of Ontario, enacts as follows:

PART I
INTERPRETATION AND APPLICATION

Purposes

1. The purposes of this Act are,

(a) to protect the privacy of individuals by establishing rules governing the collection, use and disclosure of personal information by organizations in accordance with the principles that,

(i) individuals are entitled to provide or withhold consent with respect to the collection, use and disclosure of their personal information,

(ii) individuals are entitled to be given information sufficient to know how their personal information is to be collected, used and disclosed,

(iii) individuals are entitled to know what rights they have in relation to the collection, use and disclosure of their personal information,

(iv) individuals are entitled to have access to their personal information,

(v) individuals are entitled to challenge the accuracy and completeness of their personal information held by an organization, and

(vi) individuals are entitled to have access to a fair, independent and accessible overseeing body to address complaints of non-compliance with this Act;

(b) to govern the collection, use and disclosure of personal information by organizations in accordance with the principles that,

(i) every organization is responsible for personal information in its custody or under its control and shall designate an individual or individuals who are employed by or in the service of the organization and who are accountable for the organization's compliance with this Act,

(ii) every organization shall ensure that personal information in its custody or under its control shall be as accurate, complete and up to date as is necessary for the purposes for which the organization uses it,

(iii) every organization shall protect personal information in its custody or under its control with security safeguards appropriate for the sensitivity of the information,

(iv) organizations shall not collect, use or disclose personal information if other information will serve the purpose of the collection, use or disclosure, as the case may be, and

(v) organizations shall not collect, use or disclose more personal information than is reasonably necessary to meet the purpose of the collection, use or disclosure, as the case may be; and

(c) to recognize the privacy right of individuals to control the collection, use and disclosure of their personal information by organizations and the need of organizations to collect, use or disclose personal information for purposes that a reasonable person would consider appropriate in the circumstances.

Definitions

2. In this Act,

"agent", in relation to an organization, means a person, whether or not the person is employed by the organization and whether or not the person is being remunerated, when the person acts for or on behalf of the organization in exercising powers or performing duties with respect to personal information; ("mandataire")

"alternative format", in relation to personal information, means a format that allows a person with a disability to read or listen to the information; ("forme spéciale")

"attorney for personal care" means an attorney under a power of attorney for personal care made in accordance with the *Substitute Decisions Act, 1992*; ("procureur au soin de la personne")

"attorney for property" means an attorney under a continuing power of attorney for property made in accordance with the *Substitute Decisions Act, 1992*; ("procureur aux biens")

"Board" means the Consent and Capacity Board constituted under the *Health Care Consent Act, 1996*; ("Commission")

"capable" means mentally capable, and "capacity" has a corresponding meaning; ("capable", "capacité")

"collect", in relation to actions of an organization that has custody or control of personal information, means to gather, acquire or obtain the information by any means from any source outside the organization or its agents, and "collection" has a corresponding meaning; ("recueillir", "collecte")

"Commissioner" means the Information and Privacy Commissioner appointed under the *Freedom of Information and Protection of Privacy Act*; ("commissaire")

"data matching" means an electronic comparison of all or part of two or more computerized sets of data, at least one of which includes personal health information, where the comparison may result in the creation of a new computerized set of data; ("comparaison de données")

"de-identify", in relation to the personal information of an individual, means to remove any information that,

(a) identifies the individual,

(b) can be manipulated by a reasonably foreseeable method to identify the individual, or

(c) can be linked or matched by a reasonably foreseeable method to other information that identifies the individual or that can be used or manipulated by a reasonably foreseeable method to identify the individual,

and "de-identification" has a corresponding meaning; ("anonymiser", "anonymisation")

"disclose", in relation to personal information in the custody or under the control of an organization, means to make the information available to an organization that is not an agent of the disclosing organization, and "disclosure" has a corresponding meaning; ("divulguer", "divulgation")

"genetic information" means personal health information about an individual that is predictive information that is derived from a test of the individual's gene products or chromosomes and that indicates a susceptibility to illness, disease, impairment or other disorders, whether physical or mental, but does not include information derived from routine physical measurements, physical examinations or the taking of a family history of the individual; ("renseignements génétiques")

"guardian of property" means a guardian of property or a statutory guardian of property under the *Substitute Decisions Act, 1992*; ("tuteur aux biens")

"guardian of the person" means a guardian of the person appointed under the *Substitute Decisions Act, 1992*; ("tuteur à la personne")

"health care" means any observation, examination, assessment, care, service or procedure that is done for a health-related purpose and that,

(a) is carried out or provided to diagnose, treat or maintain an individual's physical or mental condition,

(b) is carried out or provided to prevent disease or injury or to promote health, or

(c) is carried out or provided as part of palliative care,

and includes,

(d) the compounding, dispensing or selling of a drug, a device, equipment or any other item to an individual, or for the use of an individual, pursuant to a prescription, and

(e) a community service that is described in subsection 2 (3) of the *Long-Term Care Act, 1994* and provided by a service provider within the meaning of that Act; ("soins de santé")

"health care practitioner" means,

(a) a person who is a member within the meaning of the *Regulated Health Professions Act, 1991* and who provides health care for payment,

(b) a person who is registered as a drugless practitioner under the *Drugless Practitioners Act* and who provides health care for payment,

(c) a member of the Ontario College of Social Workers and Social Service Workers who provides health care for payment, or

(d) any other person whose primary function is to provide health care for payment; ("praticien de la santé")

"health information custodian" means, subject to section 3, a person described in one of the following paragraphs who has custody or control of personal health information as a result of or in connection with performing the person's powers or duties or the work described in the paragraph, if any:

1. A health care practitioner.

2. A service provider within the meaning of the *Long-Term Care Act, 1994* who provides a service to which that Act applies.

3. A person who operates one of the following facilities, programs or services:

   i. A hospital within the meaning of the *Public Hospitals Act*, a private hospital within the meaning of the *Private Hospitals Act*, a psychiatric facility within the meaning of the *Mental Health Act*, an institution within the meaning of the *Mental Hospitals Act*, a regional cancer centre or an independent health facility within the meaning of the *Independent Health Facilities Act*.

   ii. An approved charitable home for the aged within the meaning of the *Charitable Institutions Act*, a home or joint home within the meaning of the *Homes for the Aged and Rest Homes Act*, a nursing home within the meaning of the *Nursing Homes Act* or a retirement home for elderly persons.

   iii. A pharmacy within the meaning of Part VI of the *Drug and Pharmacies Regulation Act*.

   iv. A laboratory or a specimen collection centre as defined in section 5 of the *Laboratory and Specimen Collection Centre Licensing Act*.

   v. An ambulance service within the meaning of the *Ambulance Act*.

vi. A home for special care within the meaning of the *Homes for Special Care Act*.

vii. A community health facility, program or service.

4. An evaluator within the meaning of the *Health Care Consent Act, 1996* or an assessor within the meaning of the *Substitute Decisions Act, 1992*.

5. A medical officer of health or a board of health within the meaning of the *Health Protection and Promotion Act*.

6. The Minister together with the Ministry of Health and Long-Term Care.

7. A prescribed person who compiles and maintains a registry or repository of,

   i. personal health information for the primary purpose of data analysis or research,

   ii. personal health information that relates to a specific disease or condition or that relates to the storage or donation of body parts or bodily substances.

8. A prescribed class of persons described in paragraph 7.

9. Any other person prescribed as a health information custodian if the person has custody or control of personal health information as a result of or in connection with performing prescribed powers, duties or work.

10. Any other prescribed class of persons described in paragraph 9; ("dépositaire de renseignements personnels sur la santé")

"health number" means the number and version code assigned to an insured person within the meaning of the *Health Insurance Act* by the General Manager of the Ontario Health Insurance Plan; ("numéro de la carte Santé")

"incapable" means mentally incapable, and "incapacity" has a corresponding meaning; ("incapable", "incapacité")

"individual" means, in relation to personal information, the individual, whether living or deceased, with respect to whom the information is or was collected, used or disclosed; ("particulier")

"information manager" means a person who, on behalf of a health information custodian,

(a) processes, stores or disposes of records of the custodian that contain personal health information, or

(b) provides information management or information technology services to the custodian with respect to records of the custodian that contain personal health information; ("gestionnaire d'information")

"information practices", in relation to an organization, means the policy of the organization for actions in relation to personal information, including,

(a) when, how and the purposes for which the organization is to collect, use, modify, disclose, retain or dispose of personal information,

(b) the administrative, technical and physical safeguards and practices that the organization maintains with respect to the information; ("pratiques relatives aux renseignements")

"inspector" means an inspector appointed under section 65; ("inspecteur")

"investigative body" means a prescribed person or body that is legally authorized in Canada to carry out an investigation relating to the enforcement of a law of Canada, a province, municipality or territory of Canada or a foreign jurisdiction; ("organisme d'enquête")

"Minister" means, unless this Act specifies otherwise, the Minister of Health and Long-Term Care, together with the Ministry of Health and Long-Term Care if the context so requires; ("ministre")

"municipality" includes a regional municipality, The District Municipality of Muskoka and the County of Oxford; ("municipalité")

Explanation:
Please note that this definition of organization includes health information custodians. This is significant because where provisions apply to organizations generally, they also apply to the health sector.

"organization" includes a person, an association whether or not incorporated, a partnership, a health information custodian, a trade union and an individual, other than an individual acting in a personal and non-commercial capacity; ("organisation")

"organizational information" means the name, title and contact information of an identifiable individual when it is used for the purpose of identifying the individual in an employment, business, professional or official capacity, including carrying on business from a dwelling, and for purposes related to the operation or functioning of an organization; ("renseignements organisationnels")

"partner" means,

(a) a person of the same sex with whom the person is living in a conjugal relationship outside marriage if the two persons,

(i) have cohabited for at least one year,

(ii) are together the parents of a child, or

(iii) have together entered into a cohabitation agreement under section 53 of the *Family Law Act*, or

(b) either of two persons who have lived together for at least one year and have a close personal relationship that is of primary importance in both persons' lives; ("partenaire")

"personal health information" means information in any form or manner about an individual, whether or not the information is recorded, if the information,

(a) is information that,

(i) identifies the individual,

(ii) can be manipulated by a reasonably foreseeable method to identify the individual, or

(iii) can be linked or matched by a reasonably foreseeable method to other information that identifies the individual or that can be manipulated by a reasonably foreseeable method to identify the individual, and

(b) is information that,

(i) relates to the physical or mental health of the individual,

(ii) relates to the providing of health care to the individual,

(iii) is a plan of service within the meaning of the *Long-Term Care Act, 1994* for the individual,

(iv) relates to payments or eligibility for health care in respect of the individual,

(v) relates to the donation by the individual of any body part or bodily substance of the individual or is derived from the testing or examination of any such body part or bodily substance,

(vi) is the individual's health number, or

(vii) identifies a provider of health care to the individual or a substitute decision-maker of the individual; ("renseignements personnels sur la santé")

"personal information" means information in any form or manner about an individual, whether or not the information is recorded, that,

(a) identifies the individual,

(b) can be manipulated by a reasonably foreseeable method to identify the individual, or

(c) can be linked or matched by a reasonably foreseeable method to other information that identifies the individual or that can be manipulated by a reasonably foreseeable method to identify the individual,

and includes personal health information and information that relates or may relate to the work performance of the individual or professional wrongdoing, misconduct or disciplinary matters involving the individual, but does not include organizational information or professional identity information; ("renseignements personnels")

"prescribed" means prescribed by the regulations; ("prescrit")

"proceeding" includes a proceeding held in, before or under the rules of a court, a tribunal, a commission, a justice of the peace, a coroner, a committee of a College within the meaning of the *Regulated Health Professions Act, 1991*, a committee of the Board of Regents continued under the *Drugless Practitioners Act*, a committee of the Ontario College of Social Workers and Social Service Workers under the *Social Work and Social Service Work Act, 1998* or an arbitrator or a mediator in a proceeding, but does not include an inspection, investigation or similar procedure that

is authorized by a warrant or under an Act of Ontario, Canada or a province or territory of Canada other than Ontario; ("instance")

"professional identity information" means the name, title, contact information and professional designation of an identifiable individual when it is used for the purpose of describing the professional or official responsibilities of the individual and the manner in which the individual carries out those responsibilities, and includes a description of those responsibilities, but does not include any personal information of another individual; ("renseignements sur l'identité professionnelle")

"psychotherapy notes" means notes of personal health information about an individual that are recorded by a health information custodian and that document the contents of conversations during a private counselling session or a group, joint or family counselling session about the individual; ("notes de psychothérapie")

"quality of care information" has the same meaning as in the *Quality of Care Information Protection Act, 2002*; ("renseignements sur la qualité des soins")

"record" means a record of information in any form or in any medium, whether in written, printed, photographic or electronic form or otherwise, but does not include a computer program or other mechanism that can produce a record; ("dossier")

"regulations" mean the regulations made under this Act, unless the context requires otherwise; ("règlements")

"relative" means either of two persons who are related to each other by blood, marriage or adoption; ("parent")

"research" means a systematic investigation designed to develop or establish principles, facts or generalizable knowledge, or any combination of them, and includes the development, testing and evaluation of research; ("recherche")

"research ethics board" means a board of persons that meets the prescribed requirements for the purpose of approving applications for a disclosure of personal health information under section 45; ("commission d'éthique de la recherche")

"spouse" means,

(a) a spouse as defined in section 1 of the *Family Law Act*, or

(b) either of two persons of the opposite sex who live together in a conjugal relationship outside marriage and,

(i) have cohabited for at least one year,

(ii) are together the parents of a child, or

(iii) have together entered into a cohabitation agreement under section 53 of the *Family Law Act*,

but does not include either of two persons of the opposite sex if they are living separate and apart within the meaning of the *Divorce Act* (Canada); ("conjoint")

"substitute decision-maker", in relation to an individual, means a person who is authorized under Part II to consent on behalf of the individual to the collection, use or disclosure of personal information about the individual and who, in accordance with that Part, is capable of giving the consent; ("mandataire spécial")

"use", in relation to actions of an organization that has custody or control of personal information, means to handle or deal with the information, including to transfer the information to an agent of the organization, but does not include to disclose the information. ("utiliser", "utilisation")

Questions:
Do the definitions provided here help you to interpret the draft bill?

Are there any definitions that require further clarification? For example, are the definitions of "health information custodian", "professional identity information", and "personal information" clear to you?

Are any definitions missing?

Interpretation, health information custodian

3. (1) A person described in any of the following paragraphs is not a health information custodian in respect of personal health information that the person collects, uses or discloses while performing the person's powers or duties or the work described in the paragraph, if any:

1. A person described in one of paragraphs 1 or 4 of the definition of "health information custodian" in section 2 who is an agent of a health information custodian, unless the person is deemed to be a separate health information custodian under this section.

2. An agent of an organization that is not a health information custodian, if the agent is not a person described in paragraph 5, 6 or 7 of the definition of

"health information custodian" in section 2 and does not provide health care in the course of performing duties for the organization.

3. A person who receives the information as a result of acting as an information manager for a health information custodian.

Other exceptions

(2) A health information custodian does not include a person described in one of the following paragraphs who has custody or control of personal health information as a result of or in connection with performing the work described in the paragraph:

1. An aboriginal healer who provides traditional healing services to aboriginal persons or members of an aboriginal community.

2. An aboriginal midwife who provides traditional midwifery services to aboriginal persons or members of an aboriginal community.

3. A person who treats another person solely by prayer or spiritual means in accordance with the tenets of the religion of the person giving the treatment.

Multiple facilities

(3) Subject to subsection (4) or an order of the Minister under subsection (6), a health information custodian that operates more than one facility described in one of the subparagraphs of paragraph 3 of the definition of "health information custodian" in section 2 shall be deemed to be a separate custodian with respect to personal health information of which it has custody or control as a result of or in connection with operating each of the facilities that it operates.

Exception

(4) Subsection (3) does not apply to a facility that is a hospital within the meaning of the *Public Hospitals Act*.

Application to act as one custodian

(5) A health information custodian that operates more than one facility described in one of the subparagraphs of paragraph 3 of the definition of "health information custodian" in section 2 may apply to the Minister, in a form approved by the Minister, for an order recognizing that the custodian acts as a single health information custodian on behalf of those facilities.

Minister's order

(6) Upon receiving an application described in subsection (5), the Minister may make an order recognizing that the custodian acts as a single health information custodian on behalf of those facilities listed in the request that the Minister specifies if the Minister is

of the opinion that it is appropriate to make the order in the circumstances, having regard to,

(a) the public interest;

(b) the applicant's ability to provide individuals with reasonable access to their personal health information;

(c) the applicant's ability to comply with the rules for the collection, use and disclosure of personal health information specified in Part III;

(d) whether the sharing of personal health information is necessary to effectively provide integrated health care; and

(e) all other prescribed criteria.

Duration

(7) Subject to subsection (8), a health information custodian does not cease to be a health information custodian with respect to a record of personal health information until complete custody or control of the record passes to another person who is legally authorized to hold the record.

Death of custodian

(8) If a health information custodian dies, the following person shall be deemed to be the health information custodian with respect to records of personal health information held by the deceased custodian until custody or control of the records passes to another person who is legally authorized to hold the records:

1. The estate trustee of the deceased custodian.

2. The person who has assumed responsibility for the administration of the deceased custodian's estate, if the estate does not have an estate trustee.

Administration of Act

4. The Minister of Consumer and Business Services is responsible for the administration of this Act.

Application of the Act

The following section gives the Lieutenant Governor in Council the ability to exempt certain statutes and programs from the privacy legislation. Exemptions may be made where other statutes or rules govern activities related to personal information in a manner that is consistent with privacy principles.

Application of Act

5. (1) Except if this Act or the regulations specifically provide otherwise, this Act applies to,

(a) the collection of personal information by an organization on or after the day this section comes into force;

(b) the use or disclosure of personal information by an organization on or after the day this section comes into force, even if the organization collected the information before that day.

Conflict

(2) In the event of a conflict between a provision of this Act or the regulations and a provision of any other Act or the regulations made under it, this Act and its regulations prevail unless this Act or its regulations specifically provide otherwise.

Freedom of information legislation

6. (1) This Act does not apply to institutions within the meaning of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*, except health information custodians, or to personal information that is not personal health information to which either of those Acts applies by any means, including by a contract between one of those institutions and another organization.

Personal health information

(2) Subject to subsection (3), the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* do not apply to personal health information collected by a health information custodian or in the custody or under the control of a health information custodian unless this Act specifies otherwise.

Transition

(3) This Act does not apply to a collection, use or disclosure of personal health information made under the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* before the day this section comes into force and the applicable Act, as the case may be, continues to apply to the collection, use or disclosure, as the case may be.

Same, request for access

(4) If, before the day this section comes into force, under the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*, a person requests, from a health information custodian, access to a record of personal information, within the meaning of the applicable Act, that contains personal health information within the meaning of this Act,

(a) this Act does not apply to the request; and

(b) the applicable Act, including the right of appeal under it, continues to apply to the request.

Same, appeal

(5) If, before the day this section comes into force, a person commences an appeal under the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* with respect to a request described in subsection (4), this Act does not apply to the appeal and the applicable Act continues to apply to the appeal.

Exceptions

(6) Sections 11, 12, 15, 17, 31, 32, 33, 34, 35, 36, 44 and 45 of the *Freedom of Information and Protection of Privacy Act* and sections 5, 9, 10, 24, 25, 26 and 34 of the *Municipal Freedom of Information and Protection of Privacy Act* apply to a health information custodian that is an institution within the meaning of either of those Acts, as the case may be, and that has custody or control of records of personal health information.

Non-application of Act

7. (1) This Act does not apply to,

(a) personal information that an individual collects, uses or discloses about another individual for personal non-commercial purposes and for no other purpose;

(b) personal information that an organization collects, uses or discloses about an individual for artistic, journalistic or literary purposes and for no other purpose;

Explanation & Question:

This provision exempting journalistic information from the Act mirrors the approach followed in the federal privacy legislation. MCBS would like to seek a balanced approach to the freedom of speech and the protection of privacy. We are interested in hearing your views on this matter.

(c) the child abuse register maintained under subsection 75 (5) of the *Child and Family Services Act*;

(d) the adoption disclosure register maintained under clause 163 (2) (a) of the *Child and Family Services Act* or information related to adoptions under Part VII of that Act;

(e) personal health information about an individual that is collected or created for the purpose of a proceeding or anticipated proceeding relating to labour relations affecting the individual until the proceeding is completed;

(f) personal health information about an individual that is collected or created for the purpose of negotiations or anticipated negotiations relating to employment relations affecting the individual until the negotiations are completed;

(g) information that relates to an adoption order, judgment or decree and that is kept in a file kept by the Registrar General under section 28 of the *Vital Statistics Act*;

(h) records to which the *Young Offenders Act* (Canada) applies;

(i) information in the custody or under the control of a court or a prescribed body;

(j) service providers within the meaning of the *Child and Family Services Act*; or

Explanation:
Please note that s.7 (5) provides the authority to repeal this provision. The non-application of the Act to service providers within the meaning of the *Child and Family Services Act* is a temporary measure to provide sufficient time to develop amendments to that statute or the proposed privacy legislation to entrench appropriate privacy rules.

(k) anything to which this Act or the regulations specifically provide that this Act or any part of it is not to apply.

Other rights and Acts

(2) Nothing in this Act shall be construed to interfere with,

(a) anything in connection with a subrogated claim;

(b) solicitor-client privilege; or

(c) anything as a result of the operation of the *Occupational Health and Safety Act*.

Other exceptions

(3) The following provisions prevail over this Act:

1. Subsections 45 (8), (9) and (10), 54 (4) and (5) and 74 (5) of the *Child and Family Services Act*.

2. Subsections 83 (1) to (4) of the Health Professions Procedural Code that is Schedule 2 to the *Regulated Health Professions Act, 1991*.

3. Subsection 4 (2) of the *Statistics Act*.

4. Anything in the *Trillium Gift of Life Network Act*.

5. Subsection 28 (2) of the *Vital Statistics Act*.

Same

(4) In the event of a conflict between, on the one hand, this Act and the regulations and, on the other hand, any of the following Acts and the regulations made under them, the applicable following Act and the regulations made under it prevail:

1. The *Family Responsibility and Support Arrears Enforcement Act, 1996*.

2. The *Human Rights Code*.

3. The *Ontario Disability Support Program Act, 1997*.

4. The *Ontario Energy Board Act, 1998*.

5. The *Ontario Works Act, 1997*.

Repeal

(5) Clause (1) (j) is repealed on a day to be named by proclamation of the Lieutenant Governor.

PART II
CONSENT TO THE COLLECTION, USE OR DISCLOSURE OF PERSONAL INFORMATION

GENERAL

Consent

8. (1) If this Act requires the consent of an individual to the collection, use or disclosure of personal information, the consent may be express or implied, except that the following consents must be express:

1. A consent to the collection of personal health information by an organization that is not a health information custodian.

Explanation:
This rule applies to personal health information in the hands of an organization that is not a health information custodian. A few additional protections have been added for personal health information due to its sensitive nature (please see sections 37(2), (3), and 56(2)). For example, employers will be required to obtain express consent before collecting personal health information from their employees rather than implying consent from the circumstances. The other rules that govern personal health information held by health information custodians have not been adopted for the private sector.

Questions:
Do you support having special rules for personal health information in the hands of organizations that are not health information custodians?

Do you think these rules, together with the general rules provide sufficient protection for personal health information in a non-health care setting? If further protections are required, what should they be?

2. A consent to the collection, use or disclosure of genetic information.

3. A consent that this Act provides must be express, and not implied.

Express consent required

(2) If an organization is in doubt as to whether or not it has consent to the collection, use or disclosure of personal information, it shall obtain express consent to the collection, use or disclosure.

Elements of express consent

(3) Express consent to the collection, use or disclosure of personal information,

(a) must be given by,

(i) the individual to whom the information relates, if he or she is capable of consenting at the time of consenting, or

(ii) a substitute decision-maker of the individual who is capable of consenting at the time of consenting, if the individual is incapable of consenting at that time;

(b) must relate to the information;

(c) must be informed;

(d) must be given voluntarily;

(e) must not be obtained through deception or coercion; and

(f) must not have been withdrawn.

Meaning of "informed consent"

(4) A consent to the collection, use or disclosure of personal information is informed if the person who gives the consent has, at the time of giving the consent,

(a) an understanding of the nature and consequences of giving or withholding consent;

(b) an understanding that the person may withdraw the consent at any time by providing notice in writing in accordance with subsection 12 (1), subject to that subsection; and

(c) the information that a reasonable person would expect in the circumstances about the purpose of the collection, use or disclosure, as the case may be.

Implied consent

(5) The consent of an individual to the collection, use or disclosure of personal information about the individual by an organization may be implied only if,

(a) in all the circumstances, the purpose of the collection, use or disclosure as the case may be, is reasonably obvious to the individual, if capable of consenting, or a substitute decision-maker of the individual, if the individual is incapable of consenting;

(b) it is reasonable to expect that the individual, if capable of consenting, or a substitute decision-maker of the individual, if the individual is incapable of consenting, would consent to the collection, use or disclosure; and

(c) the organization uses or discloses the information for no purpose other than the purpose for which it was collected.

Obvious purpose

(6) As part of making the purpose of the collection, use or disclosure of personal information about an individual by an organization obvious to the individual or a substitute decision-maker of the individual, the organization may post or provide a notice describing the purpose where it is likely to come to the individual's attention.

Consent for genetic information

(7) A consent to the collection, use or disclosure of genetic information about an individual shall be a consent that is specific only to genetic information about the individual and shall be separate from any consent given for the collection, use or disclosure of any other kind of personal information about the individual.

Capacity to consent

9. (1) An individual is capable of consenting to the collection, use or disclosure of personal information if the individual is able to understand the nature of the information and to appreciate the reasonably foreseeable consequences of giving or withholding the consent.

Different information

(2) An individual may be capable of consenting to the collection, use or disclosure of some parts of personal information, but incapable of consenting with respect to other parts.

Different times

(3) An individual may be capable of consenting to the collection, use or disclosure of personal information at one time, but incapable of consenting at another time.

Presumption of capacity

(4) An individual is presumed to be capable of consenting to the collection, use or disclosure of personal information.

Non-application

(5) An organization may rely on the presumption described in subsection (4) unless the organization has reasonable grounds to believe that the individual is incapable of consenting to the collection, use or disclosure of personal information.

Persons who may consent

10. (1) If this Act or any other Act refers to a consent required of an individual to a collection, use or disclosure of personal information about the individual, a person described in one of the following paragraphs may give, withhold or withdraw the consent or provide the information:

1. If the individual is capable of consenting to the collection, use or disclosure of the information, the individual or any person whom the individual has authorized in writing to act on his or her behalf.

2. If the individual is incapable of consenting to the collection, use or disclosure of the information,

    i. a person who is authorized at law to consent on behalf of the individual, if the personal information is not personal health information that a health information custodian is collecting, using or disclosing,

    ii. the person who is authorized under section 14 to consent on behalf of the individual, if the personal information is personal health information that a health information custodian is collecting, using or disclosing.

3. If the individual is deceased, the deceased's estate trustee or the person who has assumed responsibility for the administration of the deceased's estate, if the estate does not have an estate trustee.

4. A person whom an Act of Ontario or Canada authorizes or requires to act on behalf of the individual.

Power to refuse consent

(2) An individual's substitute decision-maker is also entitled to refuse consent on behalf of the individual.

Interests of individual

(3) An individual's substitute decision-maker who gives a consent under subsection (1) shall put the interest of the individual ahead of their own interests.

Transition

(4) Subsection (1) does not apply to a consent that an individual gives under another Act, before the day that subsection comes into force, to a collection, use or disclosure of information that is personal information.

Rights of substitute decision-maker

11. (1) If this Act requires an organization to give information to an individual who is incapable of consenting, the organization shall give the information to a substitute decision-maker of the individual who has consented on the individual's behalf.

Acting for individual

(2) If this Act permits an individual to make a request or to take a step and the individual is incapable of consenting, a substitute decision-maker of the individual who has consented on the individual's behalf may make the request or take the step on behalf of the individual.

Other authorized persons

(3) This section does not affect the rights and duties of any other person who is authorized by law to act on behalf of an individual who is less than 18 years of age.

Withdrawal of consent

12. (1) An individual may withdraw consent to the collection, use or disclosure of his or her personal information by an organization by providing notice in writing to the organization except,

(a) if the individual and the organization have entered into a contract that has not been fully performed and the individual does not have the right at law to cancel the contract;

(b) if the individual has requested the organization to provide goods or services, the organization has not completely fulfilled the request and the individual does not have the right at law to withdraw the request;

(c) if withdrawing the consent would interfere with the provision of health care to the individual and the individual has not withdrawn consent to receiving the specific health care to which the information relates;

(d) if withdrawing the consent would frustrate a legal obligation;

(e) if the information is personal health information, the individual has consented to the disclosure of the information to another organization for the purpose of research and that organization has relied on the information; or

(f) in other cases specified in the regulations.

Information about consequences

(2) The organization shall provide information to the individual of the consequences of withdrawing consent to the collection, use or disclosure of the personal information.

Explanation:

This section specifies circumstances where individuals would not be entitled to withdraw the consent they previously provided to the collection, use or disclosure of their personal information. These provisions are meant to balance the right of individuals to exercise control over their personal information while not unfairly obstructing the activities of other organizations who may have relied on the earlier consent provided.

Question:

Are these exceptions to the right to withdraw consent reasonable?

Are there other circumstances where individuals should not be able to withdraw their consent?

PERSONAL HEALTH INFORMATION DEALT WITH BY A HEALTH INFORMATION CUSTODIAN

Determination of incapacity

Explanation:

Sections 13 to 18 set out the rules for health organizations to determine if someone is incapable of giving consent to activities involving their personal health information and the rules for substitute decision making. MCBS has included these in the consultation draft to facilitate a discussion on their content. In the final version of the legislation, a number of these provisions may be moved to regulation.

13. (1) A health information custodian may make a determination, in accordance with section 9, that an individual is incapable of consenting to the collection, use or disclosure of his or her personal health information by a health information custodian.

Notice to individual

(2) Upon making a determination under subsection (1), the health information custodian shall give notice in writing to the individual, in accordance with the requirements specified in the regulations, of the determination and the individual's right to apply to the Board for a review of the determination.

Review of determination

(3) An individual whom a health information custodian determines is incapable of consenting to the collection, use or disclosure of his or her personal health information by a health information custodian may apply to the Board for a review of the determination.

Parties

(4) The parties to the application are:

1. The individual applying for the review.

2. The health information custodian.

3. All other persons whom the Board specifies.

Powers of Board

(5) The Board may confirm the determination of incapacity or may determine that the individual is capable of consenting to the collection, use or disclosure of his or her personal health information by a health information custodian.

Restriction on repeated applications

(6) If a determination that an individual is incapable of consenting is confirmed on the final disposition of an application under this section, the individual shall not make a new application under this section within six months after the final disposition of the earlier application, unless the Board gives leave in advance.

Grounds for leave

(7) The Board may give leave for the new application to be made if it is satisfied that there has been a material change in circumstances that justifies reconsideration of the individual's capacity.

Procedure

(8) Sections 73 to 81 of the *Health Care Consent Act, 1996* apply with necessary modifications to an application under this section.

Incapable individual: persons who may consent

Explanation:
Sections 14 to 18 provide for the appointment of substitute decision-makers where individuals are not capable of consenting to the collection, use and disclosure of their personal health information. These sections combine and adapt the provisions of the *Health Care Consent Act*, and the *Substitute Decisions Act*.

Questions:
Are these provisions appropriate in the context of privacy protection for personal health information?

Should these rules for substitute decision-makers regarding personal health information be streamlined with the general rules for personal information?

14. (1) If an individual is determined to be incapable of consenting to the collection, use or disclosure of personal health information by a health information custodian, a person described in one of the following paragraphs may, on the individual's behalf, give, withhold or withdraw the consent or may provide the information:

1. The individual's guardian of the person or guardian of property, if the consent relates to the guardian's authority to make a decision on behalf of the individual.

2. The individual's attorney for personal care or attorney for property, if the consent relates to the attorney's authority to make a decision on behalf of the individual.

3. The individual's representative appointed by the Board under section 16, if the representative has authority to give the consent.

4. The individual's spouse or partner.

5. A child or parent of the individual, or a children's aid society or other person who is lawfully entitled to give or refuse consent in the place of the parent. This paragraph does not include a parent who has only a right of access to the individual. If a children's aid society or other person is lawfully entitled to consent in the place of the parent, this paragraph does not include the parent.

6. A parent of the individual with only a right of access to the individual.

7. A brother or sister of the individual.

8. Any other relative of the individual.

Requirements

(2) A person described in subsection (1) may consent only if the person,

(a) is capable of consenting to the collection, use or disclosure of personal health information by a health information custodian;

(b) in the case of an individual, is at least 16 years old or is the parent of the individual to whom the personal health information relates;

(c) is not prohibited by court order or separation agreement from having access to the individual to whom the personal health information relates or from giving or refusing consent on the individual's behalf;

(d) is available; and

(e) is willing to assume the responsibility of making a decision on whether or not to consent.

Meaning of "available"

(3) For the purpose of clause (2) (d), a person is available if it is possible, within a time that is reasonable in the circumstances, to communicate with the person and obtain a consent.

Ranking

(4) A person described in a paragraph of subsection (1) may consent only if no person described in an earlier paragraph meets the requirements of subsection (2).

Same

(5) Despite subsection (4), a person described in a paragraph of subsection (1) who is present or has otherwise been contacted may consent if the person believes that,

(a) no other person described in an earlier paragraph or the same paragraph exists; or

(b) although such other person exists, the other person is not a person described in paragraph 1 or 2 of subsection (1) and would not object to the person who is present or has otherwise been contacted making the decision.

Public Guardian and Trustee

(6) If no person described in subsection (1) meets the requirements of subsection (2), the Public Guardian and Trustee may make the decision to consent.

Conflict between persons in same paragraph

(7) If two or more persons who are described in the same paragraph of subsection (1) and who meet the requirements of subsection (2) disagree about whether to consent, and if their claims rank ahead of all others, the Public Guardian and Trustee may make the decision in their stead.

Factors to consider re consent

15. A person who makes a decision on whether or not to consent under this Act or any other Act on behalf of or in the place of an individual, to a collection, use or disclosure of personal health information about the individual by a health information custodian or whether or not to provide the information shall take into consideration,

(a) the wishes, values and beliefs that,

(i) if the individual is capable, the person knows the individual holds and believes the individual would want reflected in decisions made concerning personal health information relating to him or her, or

(ii) if the individual is incapable or is deceased, the person knows the individual held when capable or alive and believes the individual would have wanted reflected in decisions made concerning personal health information relating to him or her;

(b) whether the benefits that the person expects from the collection, use or disclosure of the information outweigh the risk of negative consequences occurring as a result of the collection, use or disclosure;

(c) whether the purpose for which the collection, use or disclosure is sought can be accomplished without the collection, use or disclosure; and

(d) whether the collection, use or disclosure is necessary to satisfy any legal obligation.

Appointment of representative

16. (1) An individual who is 16 years old or older and who is determined to be incapable of consenting with respect to personal health information may apply to the Board for appointment of a representative to consent on the individual's behalf to a collection, use or disclosure of the information by a health information custodian or to provide the information.

Application by proposed representative

(2) If the individual does not apply to the Board under subsection (1) as soon as possible after a health information custodian determines that the individual is incapable of consenting, the custodian shall notify the individual in writing that another individual who is 16 years old or older and who is capable of consenting may apply to the Board to be appointed as a representative to consent on behalf of the incapable individual to a collection, use or disclosure of the information by a health information custodian.

Exception

(3) Subsections (1) and (2) do not apply if the individual to whom the personal health information relates has a guardian of the person, a guardian of property, an attorney for personal care, or an attorney for property, who has authority to give or refuse consent to the collection, use or disclosure.

Parties

(4) The parties to the application are:

1. The individual to whom the personal health information relates.

2. The proposed representative named in the application.

3. Every person who is described in paragraph 4, 5, 6 or 7 of subsection 14 (1).

4. All other persons whom the Board specifies.

Appointment

(5) In appointing a representative under this section, the Board may authorize the representative to consent, on behalf of the individual to whom the personal health information relates, to,

(a) a particular collection, use or disclosure at a particular time;

(b) a collection, use or disclosure of the type specified by the Board in circumstances specified by the Board, if the individual is determined to be incapable of consenting with respect to personal health information at the time the consent is sought; or

(c) any collection, use or disclosure at any time, if the individual is determined to be incapable of consenting with respect to personal health information at the time the consent is sought.

Criteria for appointment

(6) The Board may appoint a representative under this section only if it is satisfied that,

(a) the representative consents to the appointment, is at least 16 years old and is capable of consenting with respect to personal health information; and

(b) the appointment is in the best interests of the individual to whom the personal health information relates, having regard to the factors set out in section 15.

Powers of Board

(7) Unless the individual to whom the personal health information relates objects, the Board may,

(a) appoint as representative a different individual than the one named in the application;

(b) limit the duration of the appointment;

(c) impose any other condition on the appointment; or

(d) on any person's application, remove, vary or suspend a condition imposed on the appointment or impose an additional condition on the appointment.

Termination

(8) The Board may, on any person's application, terminate an appointment made under this section if,

(a) the individual to whom the personal health information relates or the representative requests the termination;

(b) the representative is no longer capable of consenting with respect to personal health information;

(c) the appointment is no longer in the best interests of the individual to whom the personal health information relates, having regard to the factors set out in section 15; or

(d) the individual to whom the personal health information relates has a guardian of the person, a guardian of property, an attorney for personal care, or an attorney for property, who has authority to give or refuse consent to the types of collections, uses or disclosures for which the appointment was made in the circumstances to which the appointment applies.

Procedure

(9) Sections 73 to 81 of the *Health Care Consent Act, 1996* apply with necessary modifications to an application under this section.

Transition, representative appointed by individual

17. (1) This Act applies to a representative whom an individual, to whom personal health information relates, appointed under section 36.1 of the *Mental Health Act* before the day this section comes into force, as if the representative were the person authorized to act on the individual's behalf under paragraph 1 of subsection 10 (1).

Limited authority

(2) The authority conferred on the representative by subsection (1) is limited to the purposes for which the representative was appointed.

Revocation

(3) An individual who is capable of consenting with respect to personal health information may revoke the appointment in writing.

Transition, representative appointed by Board

18. (1) This Act applies to a representative whom the Board appointed under section 36.2 of the *Mental Health Act* or who was deemed to be appointed under that section before the day this section comes into force for an individual to whom personal health information relates, as if the representative were the individual's representative appointed by the Board under section 16.

Limited authority

(2) The authority conferred on the representative by subsection (1) is limited to the purposes for which the representative was appointed.

PART III
COLLECTION, USE AND DISCLOSURE OF PERSONAL INFORMATION

GENERAL LIMITATIONS

Requirement for consent

19. (1) An organization shall not collect, use or disclose personal information about an individual unless it has obtained the individual's consent under this Act or this Act permits the collection, use or disclosure, as the case may be.

Tied consent

(2) An organization shall not, as a condition of dealing with an individual, require the individual to consent to the collection, use or disclosure of,

(a) personal information about the individual beyond that required to fulfill the purpose of the dealing; or

(b) the individual's genetic information.

Explanation & Question:
Getting consent to collect, use and disclose personal information is important for privacy protection and is a first order principle of the Canadian Standards Association. The flow of information that is required to provide quality health care and administer the health care system raises some unique questions about how health organizations can best implement the consent principle. The goal is to provide patients with knowledge and control over their personal health information, while not interfering with the legitimate exchanges of information required for the system to operate efficiently.

MCBS is mindful of the need not to impose an undue burden on health care providers or to impose requirements that may interfere with the delivery of quality health care. Your views on the options below or alternative recommendations would be valued.

(i) CONSENT FORM
Require health organizations to obtain express consent from patients, upon their first visit, through a signed form. The form would indicate the instances in which the Act would allow the organization to collect, use or disclose personal health information without the individual's consent. The form would also explain that any additional collections, uses or disclosures, such as to an employer or insurance company, would require the individual's consent. The form could be combined with other forms used to gain consent for treatment or to collect needed personal information.

With this option, a number of subsequent exchanges and uses of a patient's personal health information could be made on the basis of implied consent, including all background activities that need to occur for treatment (e.g. sending health information to labs for testing), and activities incidental to treatment (e.g. sending health information to pharmacists for prescriptions or to nursing homes for continuing treatment).

(ii) NOTICE FORM
Require health organizations to provide a notice to individuals about the purposes for which their personal health information is being collected. The notice would indicate the instances in which the Act allows the organization to collect, use or disclose personal health information without the individual's consent. This option would also involve amending the rules to allow information collected pursuant to the notice to be used or disclosed both for health care and for broader purposes across the health system. In otherwords, the notice would replace the consent requirement within the health system. The notice would also explain that any additional collections, uses or disclosures, such as to an employer or insurance company, would require the individual's consent.

(iii)CONSENT IMPLIED IN THE CONSENT TO TREATMENT

Under this approach, it would be assumed that presenting oneself for treatment is equivalent to consent to the collection, use and disclosure of personal health information for the purpose of receiving treatment. This would include all background activities that need to occur for treatment (e.g. sending health information to labs for testing), and activities incidental to treatment (e.g. sending health information to pharmacists for prescriptions or to nursing homes for continuing treatment). Organizations would be required to obtain express consent from individuals to collect, use or disclose their personal health information for purposes not related to their treatment.

Other information

20. (1) An organization shall not collect, use or disclose personal information if other information will serve the purpose of the collection, use or disclosure.

Same, personal health information

(2) An organization shall not collect, use or disclose personal health information if other information will serve the purpose of the collection, use or disclosure.

Extent of information

21. An organization shall not collect, use or disclose more personal information than is reasonably necessary to meet the purpose of the collection, use or disclosure, as the case may be.

Purpose

22. (1) An organization shall not collect, use or disclose personal information about an individual with the individual's consent,

(a) for any purpose or purposes other than the purpose or purposes to which the individual consented; or

(b) for any purpose that a reasonable person would not consider appropriate in the circumstances.

Explanation:

This section states that where organizations collect, use or disclose someone's personal information <u>with consent</u>, they must limit their activities to the purposes consented to by the individual and to purposes that are reasonable and appropriate. This section does not override the sections, which explicitly authorize organizations to collect, use or disclose someone's personal information <u>without consent</u>.

Identification of purposes

(2) At or before the time that an organization collects personal information about an individual with the express consent of the individual, it shall identify to the individual the purposes for which it is collecting the information.

Control of agents

23. An organization shall not permit its agents to collect, use, disclose, retain or dispose of personal information unless,

(a) the organization is authorized or required to collect, use, disclose, retain or dispose of the information, as the case may be; and

(b) the collection, use, disclosure, retention or disposition of the information, as the case may be, is in the course of the agent's duties and not contrary to the limits imposed by the organization, this Act or another law.

Direct collection

24. An organization that collects personal information about an individual shall collect it directly from the individual unless,

(a) the individual consents to having the organization collect the information from the person who has custody or control of it;

(b) the individual consents to having the organization that has custody or control of the information disclose it;

(c) the person who has custody or control of the information is authorized at law to act on behalf of the individual and consents to the disclosure of the information to the organization;

(d) this Act authorizes the organization to collect the information; or

(e) the organization is authorized by another Act or at law to collect the information in a manner other than directly from the individual.

Use and disclosure of personal information

25. An organization that collects personal information in contravention of this Act shall not use it or disclose it.

Fundraising

26. An organization shall not use or disclose personal information about an individual for the purpose of fundraising activities unless the individual consents, except as provided in the regulations.

Explanation:

This section sets out the obligation of all organizations to get consent from people before collecting, using or disclosing their personal information for fundraising purposes. This rule would not apply to a person's contact details at work, since this information is not considered "personal" in our draft *Act*. Exceptions to this requirement may be made by regulations under this *Act*.

The proposed regulation for the health sector (e.g. hospitals, hospital foundations) would permit fundraising from former patients with a modified type of consent. The rationale for this proposal is threefold: First, it is not appropriate for a hospital or other health care facility to ask individuals if they will let their name and address be used for fundraising purposes at the point at which they are seeking treatment. Second, hospitals must provide matching funds from the private sector for capital investments by government. Finally, the majority of fundraising from past patients in the health sector currently operates according to a best practices standard developed by the Association of Health Care Philanthropy.

Under the proposed regulation, the health organization would be required to do two things: (1) Give the individual an opportunity to decline any requests for fundraising upon discharge or release, and if they did not decline (2) Send the individual a notice no earlier than 60 days after the person's release, explaining that his/her personal information may be used for fundraising, unless the individual asks the organization not to do so. In addition, the fundraising activities would have to relate to the organization's operations and the solicitation would not be able to refer to whether or what kind of care was received by the individual.

Question:

Some organizations have requested that certain fundraising activities be exempt from the requirement to get consent. Other organizations have requested an opt-out approach like the above proposed rules for the health sector. In your opinion, should there be any exemptions or modifications to the consent requirement when collecting, using or disclosing personal information for fundraising purposes? Should the above rules for fundraising in the health sector remain as proposed?

Use outside Ontario

27. (1) An organization shall not use, outside Ontario, personal information collected in Ontario unless,

(a) this Act would permit the organization to make the same use of the information in Ontario; and

(b) the organization takes appropriate steps to preserve the confidentiality of the information and to protect the privacy of individuals.

Exception

(2) Nothing in this section affects a use of personal information that is required under another Act or that is outside the legislative competence of Ontario.

Disclosure outside Ontario

28. (1) An organization shall not disclose personal information collected in Ontario to an organization outside Ontario unless,

(a) the organization receiving the information performs functions comparable to the functions performed by a person to whom this Act would permit the disclosing organization to disclose the information in Ontario; and

(b) the disclosing organization believes on reasonable grounds that the organization receiving the information will take appropriate steps to preserve the confidentiality of the information.

Exception

(2) Nothing in this section affects a disclosure of personal information that another Act requires or authorizes be made or a disclosure that is necessary for a purpose set out in subsection 38 (3).

Extended right to disclose

29. (1) An organization that obtains the consent of an individual to disclose personal information about the individual that is not personal health information may disclose the information to any organization that meets the description of the type of organization for which it has the individual's consent to disclose the information.

Same, personal health information

(2) An organization that is not a health information custodian and that obtains the consent of an individual to disclose personal health information about the individual may disclose the information to any organization that meets the description of the type of organization for which it has the individual's consent to disclose the information.

Use and disclosure of personal health information

30. An organization that is not a health information custodian and that lawfully collects personal health information about an individual from a health information custodian, shall not, unless the individual consents or this Act or some other law specifically provides otherwise,

(a) use the information for any purpose other than the purpose for which the custodian was authorized to disclose the information under this Act; or

(b) disclose the information.

Marketing

31. (1) An organization shall not use or disclose personal information about an individual to market goods or services or for market research unless the individual consents.

No disclosure for consideration

(2) A health information custodian shall not disclose, for consideration, personal health information about an individual under subsection (1), even if the individual consents.

Fees for personal health information

32. A health information custodian shall not charge fees to a person that exceed those that are prescribed when collecting, using or disclosing personal health information under this Act.

COLLECTION WITHOUT CONSENT

General collection

Explanation:

Sections 33 to 48 list the exemptions to the requirement to obtain consent when collecting, using or disclosing personal information, including those specific to personal health information in the health sector.

Sections 33, 35 and 37 apply to all personal information held by organizations (e.g. employee records in businesses and hospitals). They also apply to personal health information held by organizations outside the health sector (e.g. insurance companies). They do not apply to personal health information held by health information custodians, which is addressed in sections 34, 36 and 38-48. The rationale for the large number of exemptions for disclosure in the health sector is that the activities are necessary, either for the provision of health care or for the effective administration of the health system.

Questions:

In your opinion, are these exemptions reasonable?

Do these exemptions strike the right balance between protecting an individual's right to control how their personal information is used with the needs of organizations to use personal information for purposes that are reasonable and appropriate? For example, do you think it is reasonable to allow organizations to collect personal information without

consent or without a warrant to investigate or to determine whether to investigate a possible breach of a contract or law in Canada?

Please comment on the specific exemptions of importance to you.

33. (1) An organization may collect personal information about an individual that is not personal health information without the consent of the individual and an organization that is not a health information custodian may collect personal health information about an individual without the consent of the individual if,

(a) the following conditions are met:

1. On reasonable grounds, it is clear that the collection is in the interests of the individual and it is not possible to obtain consent in a timely way.

2. At the time of collecting the information or, if that is not reasonably practical, within a reasonable time after collecting the information, the organization gives written notice to the individual stating the purpose for which it is collecting the information and stating that it is collecting information under the authority of this clause;

(b) the following conditions are met:

1. The purpose of the collection reasonably relates to determining whether to investigate or investigating whether there has been a breach of an agreement or a contravention of an Act, a regulation or a law of a province or territory of Canada, including the common law and a rule or other instrument that such a law authorizes to be made.

2. It is reasonable to expect that obtaining the consent of the individual would compromise the availability of the information or its accuracy or would frustrate the investigation;

(c) the information is available to the public and is specified in the regulations;

(d) the following conditions are met:

1. The organization is collecting the information for the purpose of dealing with an emergency that threatens the life, health or security of an individual.

2. At the time of collecting the information or, if that is not reasonably practical, within a reasonable time after collecting the information, the organization gives written notice to the individual stating the purpose for which it is collecting the information and stating that it is collecting information under the authority of this clause;

(e) the following conditions are met:

1. It is not reasonably practical to obtain the individual's consent.

2. The organization is collecting the information for statistical, scientific or scholarly study or research purposes and the information is necessary for those purposes.

3. The organization has informed the Commissioner and the Commissioner approves the collection.

4. At the time of collecting the information or, if that is not reasonably practical, within a reasonable time after collecting the information, the organization gives written notice to the individual stating the purpose for which it is collecting the information and stating that it is collecting information under the authority of this clause;

(f) the following conditions are met:

1. The organization is authorized at law to require the information to determine the individual's entitlement to social services or the individual's initial or ongoing eligibility under the *Ontario Disability Support Program Act, 1997* or the *Ontario Works Act, 1997*.

2. At the time of collecting the information or, if that is not reasonably practical, within a reasonable time after collecting the information, the organization gives written notice to the individual stating the purpose for which it is collecting the information and stating that it is collecting information under the authority of this clause;

(g) the following conditions are met:

1. The information does not constitute all of the assets or substantially all of the assets of the organization.

2. The information is incidental to the negotiating and concluding by the organization of a transfer of the assets of its business.

3. The successor owner of the assets will carry on substantially the same business and will make use of the information for substantially the same purposes as the organization;

(h) the following conditions are met:

1. The information is relevant to litigation in a court proceeding or a tribunal of Canada, a province or territory of Canada or a municipality.

2. At the time of collecting the information or, if that is not reasonably practical, within a reasonable time after collecting the information, the organization gives written notice to the individual stating the purpose for which it is collecting the information and stating that it is collecting information under the authority of this clause; or

(i) the collection is authorized or required by law.

Same, not personal health information

(2) In addition to subsection (1), an organization may collect personal information about an individual that is not personal health information without the consent of the individual if the organization requires the information for the purposes of negotiating and concluding a business transaction and the organization is under a statutory or contractual obligation not to disclose the information.

Collection of personal health information by a custodian

34. A health information custodian may collect personal health information about an individual without the consent of the individual if,

(a) the custodian is authorized at law to collect the information in a manner other than directly from the individual;

(b) it is not reasonably possible to collect the information directly from the individual and the information is reasonably necessary for the providing of health care to the individual;

(c) the custodian collects the information from a person who is authorized or required by this Act, another Act or an Act of Canada to disclose it to the custodian;

(d) the custodian collects the information for the purpose of investigating whether there has been a breach of an agreement or a contravention of this Act, another Act or an Act of Canada; or

(e) the custodian collects the information for the purpose of the conduct of a proceeding or a possible proceeding.

USE WITHOUT CONSENT

General use

35. An organization may use personal information about an individual that is not personal health information without the consent of the individual and an organization that is not a health information custodian may use personal health information about an individual without the consent of the individual,

(a) in any of the circumstances described in the clauses of section 33, reading all references to collection in that section as references to use;

(b) if the use is solely for historical or archival purposes;

(c) if the use is for the purpose of modifying the information in order to conceal the identity of the individual; or

(d) in the cases described in the regulations for the purpose of this clause.

Use of personal health information by a custodian

36. (1) A health information custodian may use personal health information about an individual without the consent of the individual,

(a) for the purpose for which the information was collected or created and for all functions necessary for carrying out that purpose;

(b) for the purpose for which a person is authorized or required to disclose the information to the custodian under this Act;

(c) for planning or delivering programs or services of the custodian, allocating resources to any of them, evaluating or monitoring any of them or detecting, monitoring or preventing fraud related to any of them;

(d) for the purpose of risk management, error management or other activities to improve the quality of care or to improve the quality of any related programs or services of the custodian;

(e) for the purpose of providing it to an agent that requires the information in order to perform duties on behalf of the custodian;

(f) for educating agents when they provide health care on behalf of the custodian;

(g) for the purpose of modifying the information in order to conceal the identity of the individual;

(h) for the purpose of a proceeding to which the custodian is a party;

(i) for the purpose of processing, monitoring, verifying or reimbursing claims for payment under any Act or program administered by the Minister;

(j) for research conducted by a person who is employed by or in the service of the custodian, if the requirements of section 45 are met in the same way that those requirements would apply to information being disclosed under that section, unless another clause of this subsection applies; or

(k) if authorized or required under any other Act or an Act of Canada or a treaty, agreement or arrangement made under any of those Acts.

Restrictions on recipient

(2) A person receiving personal health information under clause (1) (h) shall not use it for any purpose other than preparing for or participating in the proceeding described in that clause.

DISCLOSURE WITHOUT CONSENT

General disclosure

37. (1) An organization may disclose personal information about an individual that is not personal health information without the consent of the individual and an organization that is not a health information custodian may disclose personal health information about an individual without the consent of the individual,

(a) in any of the circumstances described in any of clauses 33 (1) (b) to (f) or clause 33 (1) (h) or (i), reading all references to collection in those clauses as references to disclosure;

(b) to a person who is a lawyer in any province or territory of Canada except Quebec or an advocate or notary in the province of Quebec and who uses the information to represent or advise the organization, if the information is necessary for that purpose;

(c) for the purpose of complying with a subpoena, warrant or order issued or made by a court, person or body with jurisdiction to compel the production of information or for the purpose of complying with the rules of that court, person or body relating to the production of information;

(d) to the government of Canada, a province or territory of Canada, a municipality or an agent of that government or municipality that requests the information, identifies its lawful authority to obtain the information and indicates that it suspects that the information relates to the security or defence of Canada or the conduct of international affairs;

(e) for the purpose of having an investigative body enforce any law of Canada, a province or territory of Canada or a foreign jurisdiction or any by-law of a municipality, carry out an investigation relating to the enforcement of that law or by-law or gather information or intelligence for the purpose of enforcing that law or by-law;

(f) for the purpose of having a legally authorized person or body carry out legally authorized activities to administer or enforce any law of Canada or a province or territory of Canada or a by-law of a municipality;

(g) to the Public Guardian and Trustee, the Children's Lawyer or a children's aid society so that they can carry out their statutory functions;

(h) to an organization whose functions include the conservation of records of historic or archival importance, if the disclosure is made for the purpose of that conservation;

(i) after the earlier of,

  (i) 150 years after a record containing the information was created, and

  (ii) 75 years after the death of the individual;

(j) if the following conditions are met:

  1. The organization discloses the information to another organization or its professional advisors.

  2. The disclosure is reasonably necessary in order for the organization to perform its functions properly.

3. The organization or professional advisors receiving the information are statutorily or contractually bound to maintain its confidentiality, not to use it for any function other than the functions of the disclosing organization and not to disclose it to any other party; or

(k) to an organization that is authorized at law to collect the information for the purpose of determining the initial or ongoing eligibility of a person under the *Ontario Disability Support Program Act, 1997* or the *Ontario Works Act, 1997*.

Same, not personal health information

(2) In addition to subsection (1), an organization may disclose personal information about an individual that is not personal health information without the consent of the individual,

(a) for the purpose of collecting a debt that the individual owes to the organization; or

(b) if the following conditions are met:

1. On reasonable grounds, it is clear that the disclosure is in the interests of the individual and it is not possible to obtain consent in a timely way.

2. At the time of disclosing the information or, if that is not reasonably practical, within a reasonable time after disclosing the information, the organization gives written notice to the individual stating the purpose for which it is disclosing the information and stating that it is disclosing information under the authority of this clause.

Same, personal health information

(3) In addition to subsection (1), an organization that is not a health information custodian may disclose personal health information about an individual without the consent of the individual,

(a) in the circumstances described in clause (2) (b) only if the disclosure is to a health information custodian for the purposes of providing health care to the individual; or

(b) after a business transaction is concluded if the information relates to the negotiating and concluding of the transaction.

Disclosures related to providing health care

38. (1) A health information custodian may disclose personal health information about an individual without the consent of the individual,

(a) to a person described in paragraph 1, 2, 3, 7 or 8 of the definition of "health information custodian" in section 2, if the disclosure is reasonably necessary for the provision of health care or assisting in the provision of health care to the individual;

(b) for the purpose of determining or verifying the eligibility of the individual under an Act of Ontario, Canada or a province or territory of Canada other than Ontario to receive health care or other benefits provided by a health information custodian, where the health care or benefits are provided or funded by the Government of Ontario, Canada, a province or territory of Canada other than Ontario or a municipality;

(c) in order for the custodian to obtain payment from the Minister or another health information custodian for health care provided to the individual; or

(d) for the purpose of contacting a relative or friend of the individual, if the individual is injured, incapacitated or ill and unable to give consent.

Facility that provides health care

(2) A health information custodian that is a facility that provides health care may disclose to a person the following personal health information relating to an individual who is a patient or a resident in the facility without the consent of the individual if the disclosure is not contrary to the known wishes of the individual and if the custodian has taken all reasonable steps in the circumstances to determine the wishes of the individual:

1. Confirmation that the individual is a patient or resident in the facility.

2. The individual's general health status described as critical, poor, fair, stable or satisfactory, or in terms indicating similar conditions.

3. The location of the individual in the facility.

Deceased individual

(3) A health information custodian may disclose personal health information about an individual who is deceased, or is believed to be deceased, without the consent of the individual,

(a) for the purpose of identifying the individual;

(b) for the purpose of informing any person whom it is reasonable to inform in the circumstances that the individual is deceased or believed to be deceased, as the case may be, and informing that person of the circumstances of the individual's death; or

(c) to the spouse, partner, sibling or child of the individual if the recipients of the information reasonably require the information to make decisions about their own health care or their children's health care, having regard to the known views that the individual previously expressed, unless the custodian is aware that a substitute decision-maker of the individual has refused to consent to the disclosure.

Disclosures for health or other programs

39. (1) A health information custodian may disclose personal health information about an individual, without the consent of the individual,

(a) to the Chief Medical Officer of Health or a medical officer of health within the meaning of the *Health Protection and Promotion Act* if the disclosure is made for a purpose of that Act;

(b) to a public health authority that is similar to the persons described in clause (a) and that is established under the laws of Canada, another province or a territory of Canada or other jurisdiction, if the disclosure is made for a purpose that is substantially similar to a purpose of the *Health Protection and Promotion Act*;

(c) to a person conducting an audit or inspection, reviewing an application for accreditation or reviewing an accreditation, if the audit, inspection or review relates to services provided by the custodian and the person does not remove any records of personal health information from the custodian's premises;

(d) to an organization that is authorized at law to collect the information for the purpose of determining the initial or ongoing eligibility of a person under the *Ontario Disability Support Program Act, 1997* or the *Ontario Works Act, 1997*; or

(e) to a prescribed person who compiles and maintains a registry or repository of,

(i) personal health information for the primary purpose of data analysis or research, or

(ii) personal health information that relates to a specific disease or condition or that relates to the storage or donation of body parts or bodily substances.

Removal allowed

(2) Despite clause (1) (c), the person described in that clause may remove records of personal health information from the custodian's premises if the removal is authorized by or under an Act or by a contract between the custodian and the person.

Disclosure for ambulance services

(3) The Minister, the operator of an ambulance service or a communication service within the meaning of the *Ambulance Act* if the operator is not a municipality, or the medical director of a base hospital designated under that Act may disclose personal health information about an individual, without the consent of the individual, to each other, to a municipality that is the operator of such an ambulance service or a communication service or to a delivery agent within the meaning of that Act for purposes relating to the discharge or exercise by the recipient of the disclosure of its duties or powers under that Act.

Purposes of disclosure

(4) The purposes mentioned in subsection (3) include purposes relating to the provision, planning, evaluation, funding, management, operation, use, inspection, investigation or regulation of ambulance services within the meaning of the *Ambulance Act*.

Disclosures related to risks

40. (1) A health information custodian may disclose personal health information about an individual without the consent of the individual if it is necessary for the purpose of eliminating or reducing a substantial risk of serious bodily harm to an identifiable individual or group of individuals.

Disclosures related to public health

(2) Nothing in this Act prevents a person who has received personal health information about an individual pursuant to the *Health Protection and Promotion Act* from disclosing the information, whether or not in the course of a proceeding, without the consent of the individual in the circumstances described in the clauses of subsection 39 (2) of that Act.

Disclosures related to custody

(3) A health information custodian may disclose personal health information about an individual, without the consent of the individual, to the head of a penal or other custodial institution in which the individual is being lawfully detained or to the officer in charge of a psychiatric facility within the meaning of the *Mental Health Act* in which the individual is being lawfully detained, to assist the institution or the facility in making a decision concerning the placement of the individual into custody, detention or release under Part IV of the *Child and Family Services Act*, the *Mental Health Act*, the *Ministry of Correctional Services Act*, the *Corrections and Conditional Release Act* (Canada), Part XX.1 of the *Criminal Code* (Canada) or the *Young Offenders Act* (Canada).

Disclosures for proceedings

41. (1) Subject to section 42, a health information custodian may disclose personal health information about an individual without the consent of the individual,

(a) for the purpose of a proceeding to which the custodian is a party;

(b) to a person who is or was an agent of the custodian or a solicitor acting on the person's behalf, if the information relates to a proceeding,

(i) that has been commenced or that is reasonably contemplated,

(ii) to which the individual is a party or is likely to be a party, and

(iii) in which the recipient of the disclosure is, or is likely to be, a party, witness or person whose actions are at issue in the proceeding;

(c) for the purpose of appointing a litigation guardian or legal representative of the individual;

(d) to a litigation guardian or legal representative who is authorized under the Rules of Civil Procedure, or by a court order, to commence, defend or continue a proceeding on behalf of the individual or to represent the individual in a proceeding; or

(e) for the purpose of complying with,

(i) a summons, order or similar requirement issued in a proceeding by a person having jurisdiction to compel the production of information, or

(ii) a procedural rule that relates to the production of information in a proceeding.

Exception

(2) Nothing in subsection (1) permits a health information custodian to disclose personal health information in a proceeding where the custodian acts as a tribunal or adjudicator.

Restrictions on recipient

(3) A person receiving personal health information under any of the clauses of subsection (1) shall not disclose it for any purpose other than preparing for or participating in the proceeding described in the applicable clause.

Disclosure of personal mental health information

Explanation:

Under the *Mental Health Act*, a clinical record prepared in a psychiatric facility is protected against disclosures in proceedings. The following section aims to extend this protection to personal mental health information in other settings. MCBS wanted to include these in the consultation draft to facilitate a discussion on their content. In the final version of the legislation, a number of these provisions may be moved to regulation.

Question:

Do these provisions reflect an appropriate balance between protecting the privacy of personal mental health information and the requirements of an efficient justice system?

42. (1) In this section,

"personal mental health information" means personal health information about an individual that,

(a) was collected or created by a psychiatrist, psychologist, or any other person acting under their direction in the course of providing professional services to the individual,

(b) was collected or created by a health care practitioner in the course of assessing, diagnosing, treating or counselling an individual solely or primarily in respect of the individual's mental health,

(c) consists of psychotherapy notes, or

(d) meets the prescribed criteria,

but does not include information that is mentioned in subsection 35 (9) of the *Mental Health Act*.

Disclosure in proceeding

(2) No person shall disclose personal mental health information about an individual in a proceeding without the consent of the individual unless,

(a) the court or other body holding the proceeding,

(i) holds a hearing, from which the public is excluded and of which notice is given to the individual, and

(ii) determines that the disclosure is essential in the interests of justice and orders the disclosure;

(b) the individual or the person who is legally authorized to act on the individual's behalf is a party to the proceeding and relies on a claim or defence to which the information is relevant;

(c) the proceeding is one in which the professional competency, capacity, conduct, actions, licensing or registration of a health information custodian is in issue and the individual has received professional services from the health information custodian;

(d) the proceeding is before the Consent and Capacity Board, the Ontario Review Board or the Health Services Appeal and Review Board or is an appeal from a decision of any of those Boards;

(e) the proceeding is a proceeding under the *Mental Health Act*, the *Health Care Consent Act, 1996* or Part XX.1 of the *Criminal Code* (Canada);

(f) the proceeding is for an order to be made under the *Substitute Decisions Act, 1992* with respect to the individual;

(g) the proceeding is a proceeding under Part III of the *Child and Family Services Act*;

(h) the proceeding is for an order to be made under Part VI of the *Child and Family Services Act* with respect to the commitment of the individual to a secure treatment program or the extension or termination of the commitment;

(i) the proceeding is one in which the information was collected or created in the course of an examination or assessment of the physical or mental condition of the individual ordered by the court or other body holding the proceeding and the disclosure is made for the purpose for which the examination or assessment was ordered;

(j) the proceeding is a proceeding before the Commissioner;

(k) the proceeding is a proceeding under the *Health Protection and Promotion Act*;

(l) the proceeding is being conducted by the Crown in relation to an alleged or allegedly attempted improper or fraudulent receipt of publicly funded benefits, including health services under the *Health Insurance Act*, for the purpose of recovering money, obtaining an order, or prosecuting an offence; or

(m) the proceeding meets the criteria that are prescribed.

Statement regarding likely harm

(3) Despite subsection (2), a person shall not disclose personal mental health information in a proceeding if a physician or psychologist who is not a party to the proceeding states in writing that he or she has reasonable grounds to believe that the disclosure of the information or a specified part of the information in the proceeding is likely to result in harm to the treatment or recovery of the individual, injury to the mental condition of another individual or bodily harm to another individual.

Hearing regarding likely harm

(4) The court or other body holding the proceeding that receives a statement under subsection (3) shall not permit the information that is subject to the statement to be disclosed in the proceeding until it has held a hearing, from which the public and the individual are excluded and of which notice is given to the person in possession of the information and the person who provided the statement.

Consent irrelevant

(5) Subsections (3) and (4) apply even if the individual to whom the personal mental health information relates has consented to the disclosure.

Examination of record

(6) At the request of the court or other body holding a hearing under subsection (4), the person in possession of the personal mental health information shall disclose it to the court or other body for the purpose of the hearing.

Order

(7) Subject to subsection (2), the court or other body holding a hearing under subsection (4) may require or permit the person in possession of the personal mental health information to disclose all or part of the information in the proceeding only if,

(a) the court or other body is satisfied that the disclosure is not likely to result in harm to the treatment or recovery of the individual to whom the personal mental health information relates, injury to the mental condition of another individual or bodily harm to another individual; or

(b) despite being satisfied that the disclosure is likely to result in harm to the treatment or recovery of the individual to whom the personal mental health information relates, injury to the mental condition of another individual or bodily harm to another individual, the court or other body is satisfied that the disclosure is essential in the interests of justice.

Return of record

(8) If a person discloses a record of personal mental health information in a proceeding as authorized by this section, the court or other body holding the proceeding shall keep it in a file not accessible to members of the public and shall return it to the person immediately after the court or other body has determined the matter with respect to which the disclosure was made.

Application of section

(9) Despite any other Act that permits a person to disclose personal mental health information in a proceeding, this section applies to the disclosure as if it were made under this Act.

Transition

(10) References in this section to a proceeding do not include a proceeding commenced before the day this section comes into force.

Transfer of records

43. A health information custodian may transfer records of personal health information about an individual without the consent of the individual to,

(a) the custodian's successor if the custodian makes reasonable efforts to give notice to the individual before transferring the records or, if that is not reasonably possible, as soon as possible after transferring the records; or

(b) the Archives of Ontario or to any other archives that is subject to this Act, the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*, for the purposes of permanent preservation and historical research if, in the opinion of the custodian, the information has enduring value.

Disclosures related to this or other Acts

44. Subject to section 41, a health information custodian may disclose personal health information about an individual without the consent of the individual,

(a) for the purpose of determining, assessing or confirming capacity under the *Health Care Consent Act, 1996*, the *Substitute Decisions Act, 1992* or this Act;

(b) to a College within the meaning of the *Regulated Health Professions Act, 1991* for the purpose of the administration or enforcement of the *Drug and Pharmacies Regulation Act*, the *Regulated Health Professions Act, 1991* or an Act named in Schedule I to that Act;

(c) to the Board of Regents continued under the *Drugless Practitioners Act* for the purpose of the administration or enforcement of that Act;

(d) to the Ontario College of Social Workers and Social Service Workers for the purpose of the administration or enforcement of the *Social Work and Social Service Work Act, 1998*;

(e) to the Public Guardian and Trustee, the Children's Lawyer or a children's aid society so that they can carry out their statutory functions;

(f) if the custodian is subject to the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*, in the circumstances described in clause 42 (h) or (n) of the *Freedom of Information and Protection of Privacy Act* or clause 32 (h) or (l) of the *Municipal Freedom of Information and Protection of Privacy Act*;

(g) to a person carrying out an inspection, investigation or similar procedure that is authorized by a warrant or under an Act of Ontario, Canada or a province or territory of Canada other than Ontario;

(h) if authorized or required by or under any other Act or an Act of Canada or a province or territory of Canada other than Ontario or a treaty, agreement or arrangement made under any of those Acts; or

(i) for the purpose of having a legally authorized person or body carry out legally authorized activities to administer or enforce any law of Canada or a province or territory of Canada or a by-law of a municipality.

Disclosure for research

Explanation:
This section sets out specific rules and requirements for health information custodians who disclose personal health information without the consent of the individual for research purposes. These rules are based on the internationally recognized Tri-Council Policy Statement: Ethical Conduct for Research Involving Humans.

Question:
Do these provisions achieve the right balance between protecting the privacy of people's health information and the public interest that is served by health research?

Will the rules and obligations be clear to organizations who wish to conduct research in the health sector?

Do these rules provide sufficient transparency, accountability and safeguards in the research process?

Explanation:
Research projects that use personal health information outside of the health sector are subject to a different set of rules under section 33(e).

Question:
In your opinion, should different rules apply to research involving personal health information outside of the health sector, or should one set of rules apply to the disclosure of this information for research purposes?

45. (1) A health information custodian may disclose personal health information about an individual to a researcher conducting research, without the consent of the individual, only if the researcher,

(a) submits to the custodian,

(i) an application in writing,

(ii) a research plan in writing that sets out the matters that are prescribed, and

(iii) a copy of the decision of a research ethics board that approves the research plan; and

(b) enters into the agreement required by subsection (9).

Research ethics board

Explanation:
In order for a health information custodian to release this personal health information, a researcher will have to submit his/her plan to a research ethics board for approval as detailed in the regulations. A number of these sections will be moved to regulation in the final version of the Act. The regulations will specify that at least one board member must be arm's-length from the people who make the appointments.

(2) A research ethics board shall ensure that it has written policies in place that govern potential conflicts of interest of board members and all other policies that are prescribed.

Annual report

(3) A research ethics board shall produce an annual report that is available to the public and that sets out the composition of the board, all conflicts of interest of board members, the organizational affiliation of the board, the board's procedures for assessing research plans that a person submits to it and all other matters that are prescribed.

Board meetings

(4) A research ethics board shall conduct its meetings according to the procedures that are prescribed when assessing a research plan.

Assessment by research ethics board

(5) When deciding whether to approve a research plan that a researcher submits to it, a research ethics board shall assess,

(a) whether it is necessary to use personal health information without consent in order to accomplish the objectives of the research;

(b) whether, at the time the research is conducted, adequate safeguards will be in place to protect the privacy of the individuals to whom the personal health information relates and to preserve the confidentiality of the information;

(c) whether the researcher is qualified to conduct the research that is the subject of the plan;

(d) the degree of risk to the individuals whose personal health information is being disclosed and whether the researcher has a methodology to mitigate those risks;

(e) the public interest in conducting the research and the public interest in protecting the privacy of the individuals whose personal health information is being disclosed; and

(f) all other matters that are prescribed.

Public interest

(6) In assessing the matters described in clause (5) (e), the research ethics board shall assess,

(a) the extent to which the research is likely to,

(i) assist in the identification, prevention or treatment of illness or disease,

(ii) further scientific understanding relating to health,

(iii) further health protection and promotion, and

(iv) improve the delivery of health services; and

(b) all other matters that are prescribed.

Decision of board

(7) After reviewing a research plan that a researcher has submitted to it, the research ethics board shall,

(a) in writing, approve the plan, with or without conditions, or refuse to approve the plan;

(b) set out in writing the reasons for its decision and the conditions, if any, for the approval; and

(c) send a copy of its decision to the researcher.

Refusal of approval

(8) The research ethics board shall refuse to approve a research plan if,

(a) it is likely to result in personal health information being published or otherwise disclosed, unless each individual whose personal health information will be disclosed consents to the disclosure; or

(b) it calls for using personal health information where it is possible to use de-identified information.

Agreement respecting disclosure

(9) Before a health information custodian discloses personal health information to a researcher under subsection (1), the researcher shall enter into an agreement with the custodian, in a form that may be prescribed, in which the researcher agrees,

(a) to comply with the conditions and restrictions, if any, specified by the research ethics board in respect of the research plan;

(b) to comply with the conditions and restrictions, if any, that the custodian imposes relating to the use, security, disclosure, return, destruction or disposal of the information;

(c) not to publish or otherwise disclose the information in a form that could reasonably enable a person to ascertain the identity of an individual to whom the information relates;

(d) not to make contact or attempt to make contact with an individual to whom the information relates, directly or indirectly, unless the custodian authorizes the researcher in writing to contact the individual;

(e) use the personal health information only for the purposes set out in the research plan as approved by the research ethics board;

(f) to comply with this Act and the regulations;

(g) to notify, in writing, the organization that established the research ethics board if the researcher becomes aware of any breach of the agreement; and

(h) to meet all requirements that are prescribed.

Compliance with agreement

(10) A researcher who enters into an agreement described in subsection (9) shall comply with the agreement.

Freedom of information legislation

(11) The *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* do not apply to personal information within the meaning of those Acts that a researcher requires for the purpose of conducting research under a research plan approved under subsection (7), if the researcher has entered into an agreement described in subsection (9) with respect to the research and, in that case, the agreement applies to the personal information that is required for the research.

Mixture of personal information

(12) If a researcher requests that a health information custodian that is an institution within the meaning of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* disclose to the researcher personal health information, together with personal information within the meaning of those two Acts that is not personal health information, those two Acts do not apply to the disclosure and this section applies to the disclosure.

Transition

(13) Despite subsections (11) and (12), nothing in this section prevents a health information custodian that is an institution within the meaning of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act* from disclosing to a researcher personal health information, that is personal information within the meaning of those two Acts, if, before the day this section comes into force, the researcher has entered into an agreement that requires the custodian to comply with clause 21 (1) (e) of the *Freedom of Information and Protection of Privacy Act* or clause 14 (1) (e) of the *Municipal Freedom of Information and Protection of Privacy Act* as a condition of disclosing the information.

Additional research

(14) A health information custodian that discloses personal health information to a researcher under this section for the purpose of conducting research shall not give the researcher permission to use the same information for any other research unless a research ethics board approves the other research in accordance with this section.

Same, use

(15) If personal health information is disclosed to a researcher under this section for the purpose of one research project, the researcher shall not use it for the purposes of another research project unless a research ethics board approves the other research project in accordance with this section.

Disclosure under other Acts

(16) Despite any other Act that permits a health information custodian to disclose personal health information to a researcher for the purpose of conducting research, this section applies to the disclosure as if it were a research plan under this section.

Transition

(17) A health information custodian, that disclosed personal health information to a researcher for the purpose of conducting research before the day this section comes into force and that discloses personal health information to the researcher for that purpose after that day, is not required to obtain the approval of a research ethics board to its research plan or to enter into the agreement described in subsection (9) until the later of the time at which the custodian discloses the information and one year after the day on which this section comes into force.

Monitoring health care payments

46. (1) A health information custodian shall, upon the request of the Minister, disclose to that Minister personal health information about an individual without the consent of the individual for the purpose of monitoring or verifying claims for payment for health care funded wholly or in part by the Ministry of Health and Long-Term Care.

Disclosure by Minister

(2) The Minister may disclose information collected under subsection (1) to any person for a purpose set out in that subsection if the disclosure is reasonably necessary for that purpose.

Disclosure for analysis of health system

Explanation:

To effectively administer the health system in a manner that meets the needs of Ontario residents, the Ministry of Health and Long-Term Care (MOHLTC) will require information for the purposes of management, evaluation, monitoring, allocation of resources and planning. To do this in a manner that is privacy protective, a data institute, separate from the MOHLTC, will be established. The data institute will remove personal identifiers from personal health information and provide it to the MOHLTC. The MOHLTC will receive only de-identified information, except where the Information and Privacy Commissioner specifically agrees that the ministry receiving identifiable information is in the public interest (see section 48). Even then, only minimum identifiers will be provided by the data institute.

Question:

Do these provisions contain sufficient safeguards to protect the privacy of people's health information? We would be interested in your views on this approach.

47. (1) A health information custodian shall, upon the request of the Minister, disclose personal health information about an individual without the consent of the individual to a health data institute that the Minister approves under subsection (13) for analysis with respect to the management, evaluation or monitoring, the allocation of resources to or future planning for all or part of the health system, including the delivery of services, if the requirements of this section are met.

Non-application of section

(2) Subsection (1) does not apply to,

(a) psychotherapy notes;

(b) a complete or substantially complete record of personal health information;

(c) the name, address or telephone number of an individual; or

(d) all other information that is prescribed.

Form, manner and time of disclosure

(3) The Minister may specify the form and manner in which and the time at which the health information custodian is required to disclose the personal health information under subsection (1).

Requirements for Minister

(4) Before requesting the disclosure of personal health information under subsection (1), the Minister shall,

(a) submit a proposal to a technical committee established by the Minister and allow the committee the time specified in subsection (8) to review and comment on the proposal; and

(b) submit the proposal, together with the comments on it from the technical committee, to the Commissioner and allow the Commissioner the time specified in subsection (9) to review and comment on the proposal.

Contents of proposal

(5) The proposal shall identify a health data institute to which the personal health information would be disclosed under this section and shall set out the prescribed matters.

Technical committee

(6) The technical committee shall consist of at least one person who has technical knowledge of health system statistical research methodology, at least one person who has

expertise in the subject-matter being analysed and at least one person from the sector to which the personal health information relates.

Review by technical committee

(7) The technical committee shall review the technological and methodological aspects of the proposal and shall consider,

(a) whether it is practical in the circumstances to obtain the consent, to the disclosure, of the individuals whose personal health information would be disclosed under this section;

(b) the feasibility of conducting the analysis without using personal health information;

(c) whether, in its opinion, the least amount of personal health information necessary to conduct the analysis is being sought;

(d) whether the proposed method to de-identify the personal health information is appropriate in the circumstances;

(e) whether the data that is required for the analysis is readily available in a form that does not contain personal health information; and

(f) all other matters that are prescribed.

Comments of committee

(8) The technical committee shall comment in writing on the proposal within the time period requested by the Minister.

Review by Commissioner

(9) Within 30 days after the Minister submits the proposal, together with the comments on it of the technical committee, to the Commissioner, the Commissioner shall review the proposal and the comments and may comment in writing on the proposal.

Consideration by Commissioner

(10) In reviewing the proposal, the Commissioner shall consider the public interest in conducting the analysis and the public interest in protecting the privacy of the individuals.

No comments

(11) If the Commissioner does not comment on the proposal within the 30 days described in subsection (9), the Commissioner shall be deemed to have made no comments.

Consideration of proposal by Minister

(12) The Minister shall consider the comments made by the technical committee and any comments made by the Commissioner, and may amend the proposal if the Minister considers it appropriate.

Approval of health data institute

(13) The Minister may approve a health data institute for the purposes of a disclosure under subsection (1) or section 48 if,

(a) the Commissioner has approved its practices and procedures to protect the privacy of the individuals whose personal health information it receives and to maintain the confidentiality of the personal health information;

(b) it has in place the practices and procedures described in clause (a);

(c) its corporate objects include performing data analysis of personal health information, linking the information with other information and de-identifying the information for the Minister; and

(d) it meets all other prescribed requirements.

Review by Commissioner

(14) The Commissioner shall review the practices and procedures of each health data institute bi-annually from the date of its approval and advise the Minister whether the institute continues to meet the requirements of clauses (13) (a) to (d).

Withdrawal of approval

(15) The Minister shall withdraw the approval of a health data institute that ceases to meet the requirements of clauses (13) (a) to (d) and, in that case, the institute shall make no further use or disclosure of any personal health information that has been disclosed to it under subsection (1).

Duties of health data institute

(16) A health data institute that receives personal health information under subsection (1) shall,

(a) follow the practices and procedures described in clause (13) (a) that the Commissioner has approved;

(b) perform the analysis and linking with other data that the Minister requires;

(c) de-identify the information;

(d) not use the information for any purpose other than those described in clauses (b) and (c);

(e) provide the results of the analysis and linking using only the de-identified information mentioned in clause (c) to the Minister or to the persons that the Minister approves;

(f) not disclose the computer algorithm used to de-identify the information;

(g) not disclose the information to the Minister or any other person if it is not in a de-identified form;

(h) not sell, trade or barter the information; and

(i) destroy or otherwise dispose of the information in accordance with the proposal that relates to the information.

Transition

(17) If the Minister has required the disclosure of personal health information for a purpose described in subsection (1) in the 18 months before this section comes into force, this section does not apply with respect to a disclosure the Minister requires for a substantially similar purpose after this section comes into force until the first anniversary of the coming into force of this section.

Notification

(18) If the Minister requires a disclosure for a substantially similar purpose under subsection (17) after this section comes into force, the Minister shall notify the Commissioner within the later of the time of requiring the disclosure and 90 days after this section comes into force.

Disclosure to Minister with approval of Commissioner

48. (1) Where a heath information custodian has disclosed personal health information to a health data institute under section 47, the Minister may in accordance with this section request that the Commissioner approve the disclosure of personal health information that has not been de-identified from the health data institute to the Minister, where the Minister is of the opinion that it is in the public interest to request the disclosure, and the requirements of this section have been met.

Non-application of section

(2) This section does not allow the collection and use of,

(a) psychotherapy notes;

(b) a complete or substantially complete record of personal health information;

(c) the name, address or telephone number of an individual; or

(d) all other information that is prescribed.

Seeking Commissioner's approval

(3) The Minister shall submit a proposal to the Commissioner requesting approval for the disclosure of the personal health information by the health data institute.

Contents of the proposal

(4) A proposal under this section shall include,

(a) a statement as to why the disclosure is reasonably required in the public interest and why the public interest cannot be met through the provisions of section 47;

(b) the extent of the identifiers that are proposed to be part of the information disclosed, and why the use of such identifiers is reasonably required for the purpose of the disclosure;

(c) a copy of all proposals and comments previously made or received under section 47 in respect of the information, if any; and

(d) all other information required by the Commissioner.

Disclosure by health data institute to Minister

(5) If the Commissioner approves the proposal, the health data institute shall disclose the personal health information to the Minister in accordance with any terms, conditions or limitations set by the Commissioner.

Minimal identifiers

(6) Before disclosing the personal health information to the Minister, the health data institute shall remove all identifiers from the information to be disclosed other than those approved by the Commissioner.

PART IV
DUTIES OF ORGANIZATIONS WITH RESPECT TO RECORDS OF PERSONAL INFORMATION

GENERAL

Accuracy

49. (1) An organization that collects, uses or discloses personal information about an individual shall,

(a) take all reasonable steps to ensure that whatever record it makes of the information is as accurate, complete and up-to-date as is necessary for the purposes for which it collects, uses or discloses the information, as the case may be;

(b) take all reasonable steps to minimize the possibility that an organization will use inaccurate personal information to make a decision about the individual; and

(c) comply with all other requirements with respect to the accuracy of records of personal information that the regulations specify, if the organization is a health information custodian.

Updating

(2) The organization shall not update a record of personal information about an individual unless,

(a) doing so is necessary to fulfill the purposes for which the organization collected the information;

(b) the individual consents to the updating; or

(c) this Act or another law permits the updating.

Security

50. (1) An organization shall take reasonable steps to ensure that personal information in its custody or control is protected against unauthorized use or disclosure and to ensure that the records containing the information are protected against unauthorized copying, modification or destruction.

Level of protection

(2) The question of what protection constitutes compliance with subsection (1) shall be determined in light of all the circumstances, including the sensitivity of the information, the amount of information and the format in which it is stored.

Notice to public

(3) Upon request, the organization shall make available to the public a general description of the safeguards that it uses to protect personal information and to fulfill its obligations under subsection (1).

Note of uses and disclosures without consent

51. (1) An organization shall make a note of all uses and disclosures that it makes of personal information about an individual without the individual's consent except if the individual would not be entitled to access to the information under subsection 56 (1) or a record of the information under subsection 58 (1).

Place to keep note

(2) The organization shall keep the note as part of the records of personal information about the individual that it has in its custody or under its control or in a form that is linked to those records.

Destruction of records

52. (1) Subject to subsection (2), an organization shall not retain a record of personal information after the purpose for which the organization collected the information has been fulfilled unless,

(a) another law requires the organization to retain the record;

(b) the organization reasonably requires the record for purposes related to its operation; or

(c) the regulations authorize the organization to retain it.

Record used for a decision

(2) An organization that has used a record of personal information about an individual to make a decision about the individual shall retain the record long enough after making the decision to allow the individual a reasonable opportunity to request access to the information.

Time for destruction

(3) An organization shall destroy or delete a record of personal information or de-identify it as soon as it is no longer authorized to retain the record under subsection (1).

Personal health information held by a custodian

(4) A health information custodian shall ensure that the records of personal health information that it has in its custody or under its control are retained, destroyed and disposed of in the manner and according to the standards that the regulations specify.

Information practices

53. (1) An organization that has custody or control of personal information shall have in place information practices that comply with the requirements of this Act and the regulations.

Duty to follow practices

(2) The organization shall act in conformity with its information practices except if the regulations specifically permit the organization not to do so.

Contact person

(3) The organization shall designate, as a contact person, an individual or individuals who are resident in Ontario and who are employed by or in the service of the organization or an agent of the organization to,

(a) facilitate the organization's compliance with this Act;

(b) ensure that all persons who are employed by or in the service of the organization are appropriately informed of their duties under this Act while employed by or in the service of the organization;

(c) respond to inquiries from the public about the organization's information practices; and

(d) receive complaints from the public about the organization's alleged contravention of this Act or the regulations.

Information for public

(4) The organization shall, in a manner that is practical in the circumstances, make available to the public a written statement that,

(a) describes the organization's information practices in a generally understandable manner;

(b) describes how to contact the contact person mentioned in subsection (3);

(c) describes how an individual may obtain access to personal information about the individual that is in the custody or control of the organization; and

(d) describes how to make a complaint to the Commissioner under this Act.

PERSONAL HEALTH INFORMATION

Separate records

Explanation:
Predictive genetic test information is increasingly being used to draw conclusions about how susceptible individuals and their families are to certain illnesses and diseases. The use and disclosure of this type of personal health information by third parties is a privacy issue that warrants special attention.

Rules have been developed for genetic test information and incorporated in the draft legislation. They are captured in sections 2 (definition of "genetic information"), 8(1) (express consent for genetic information), 8(7) (separate consent for genetic information), 19(2)(b) (prohibition on refusing goods or services) and 54 (retention of genetic information in separate records).

Questions:
Does the definition of "genetic information" accurately reflect the type of information that ought to be covered by these rules?

What, if any, protections should the Act contain to protect the privacy of an individual's genetic test information?

54. An organization shall, where possible, retain genetic information about an individual in a record that is separate from the records of other personal health information about the individual.

Data matching

MCBS wanted to include the following section in the consultation draft to facilitate a discussion on its content. In the final version of the legislation, a number of these subsections may be moved to regulation.

55. (1) This section applies to a health information custodian that is an institution within the meaning of the *Freedom of Information and Protection of Privacy Act* and the *Municipal Freedom of Information and Protection of Privacy Act* and that performs data matching, where the results of the matching could foreseeably directly affect an identifiable individual or a class of identifiable individuals, including affecting the ability of the individual or the class of individuals to access a service, benefit or program.

Exceptions

(2) This section does not apply to a data matching if,

(a) the matching does not involve personal health information;

(b) the matching is part of a research methodology that has been approved by a research ethics board under section 45;

(c) the purpose of the matching is to evaluate the utilization or effectiveness of an existing program or service;

(d) the purpose of the matching is to ensure that personal information is accurate and current and to update the information;

(e) the purpose of the matching is to reconcile financial information; or

(f) the purpose of the matching is one that is prescribed.

Requirements

(3) In addition to complying with the rules for collection, use and disclosure of personal health information set out in Part III, a health information custodian to which this section applies, that intends to perform data matching of personal health information about an individual or individuals without the consent of the individual or individuals, may only perform the data matching if the custodian,

(a) where the custodian intends to combine information in its custody and control with information under the custody and control of another custodian or a person who is not a custodian, enters into a contract with the other custodian or person that sets out at least those matters set out in subsection (5), before performing the data matching;

(b) prepares a privacy impact assessment and submits it to the Commissioner for review and comment before performing the data matching, unless the assessment that would be prepared is substantially similar to an assessment that the custodian has already prepared and submitted to the Commissioner; and

(c) complies with all other prescribed requirements.

Ongoing data matching

(4) A custodian is not required to prepare a privacy impact assessment for each data matching that is part of an ongoing data matching if,

(a) the custodian identifies that fact in the privacy impact assessment for the initial data matching;

(b) the custodian has entered into a contract under clause (3) (a) and there is no change to the contract; and

(c) the Commissioner has reviewed a privacy impact assessment for the initial data matching.

Contents of assessment

(5) A privacy impact assessment shall include the matters that are prescribed.

Comments by Commissioner

(6) Within 30 days after a health information custodian submits a privacy impact assessment under this section to the Commissioner, the Commissioner shall review it and may comment on the proposed data matching.

Commencement of data matching

(7) A health information custodian may commence a data matching under this section on the earlier of obtaining a response from the Commissioner or 30 days after submitting the assessment to the Commissioner.

Transition

(8) If a health information custodian has performed a data matching described in this section in the 18 months before this section comes into force, this section does not apply with respect to a substantially similar data matching that the custodian performs after this section comes into force until the first anniversary of the coming into force of this section.

Notification

(9) The custodian described in subsection (8) that performs a substantially similar data matching after this section comes into force shall notify the Commissioner within the later of commencing the substantially similar data matching and 90 days after this section comes into force.

PART V
ACCESS TO PERSONAL INFORMATION

ALL ACCESS EXCEPT PERSONAL HEALTH INFORMATION WITH A HEALTH INFORMATION CUSTODIAN

Individual's right of access

Explanation:

Individuals have a right of access to their own information, with specific and limited grounds for denying access set out in the statute. Two separate sets of rules are provided

for access to personal health information held by health information custodians and access to personal information held by other organizations. For example, a health care provider may deny access to health information on the basis that it could result in serious harm to the treatment or recovery of an individual. Questions relating to the denial of access and harm will be heard by the Consent and Capacity Board. The access rules were drafted separately to accommodate these types of issues that are particular to the health sector.

Note: In the final version of the legislation, the timelines for access will be streamlined for all organizations, except for those covered under the Mental Health Act. The rules for charging or waiving a reasonable cost-recovery fee for access will also be streamlined for all organizations. The other access rules may be kept distinct.

Section 56(1) applies to all personal information in organizations that is not health information. Section 56(2) applies to personal health information held by organizations that are not health information custodians (56(2) (a) actually incorporates all of the rules in 56(1)). Sections 58 through 61 set out the rules for accessing personal health information held by a health information custodian.

Questions:
Do you find it confusing or unnecessary to have separate access rules in one Act?

Do you think the access rules should be distinct for health information custodians?

Do you think the roles envisioned for the Consent and Capacity Board and the Commissioner are appropriate in the process of accessing personal health information?

56. (1) Subject to this Part, an individual is entitled, in accordance with this Part, to access to personal information about the individual that is not personal health information and that is in the custody or under the control of an organization, including information on its use and disclosure, unless,

(a) the information relates to the security or defence of Canada or the conduct of international affairs;

(b) the information relates to having an investigative body enforce any law of Canada, a province or territory of Canada or a foreign jurisdiction or any by-law of a municipality, carry out of an investigation relating to the enforcement of that law or by-law or gather information or intelligence for the purpose of enforcing that law or by-law;

(c) subsection (8) prohibits the organization from granting the individual access to the information;

(d) the organization has reasonable grounds to believe that the information relates to a breach of an agreement or a contravention of the laws of Canada, a

province or territory of Canada or a foreign jurisdiction that has been, is being or is about to be committed;

(e) the information is subject to a legally recognized privilege;

(f) the information is collected or created for the purpose of determining whether to commence a proceeding or for the purpose of conducting a proceeding or enforcing a judgment, order or award made in a proceeding;

(g) granting the access could reasonably be expected to threaten the life or security of another individual;

(h) granting the access would reveal an organizational secret that could reasonably be expected to harm the organization;

(i) granting the access would likely reveal personal information of another individual who does not consent to granting the access and it is not possible to sever the requested information from the personal information of the other individual; or

(j) the information is quality of care information.

Same, personal health information

(2) In addition to subsection (1) and subject to this Part, an individual is entitled, in accordance with this Part, to access to personal health information about the individual that is in the custody or under the control of an organization that is not a health information custodian, including information on its use and disclosure, except,

(a) in the circumstances described in any of the clauses of subsection (1);

(b) if granting the access is prohibited by another Act or the common law; or

(c) if granting the access could reasonably be expected to,

(i) result in serious harm to the treatment or recovery of the individual, serious emotional harm to the individual or another individual or serious bodily harm to another individual, or

(ii) reveal the identity of an individual who supplied the information in the record to the organization, as required by law.

Notice of request for access

(3) If an organization receives a request from an individual under section 57 for access to personal information that the organization has previously disclosed to the government of Canada, a province or territory of Canada, a municipality or an agent of that government or municipality under clause 37 (1) (d) or to an investigative body under clause 37 (1) (e), the organization shall, without delay, give written notice to the person or body who received disclosure of the information under the applicable clause stating that the individual has made the request.

Notice of objection

(4) Within 30 days of receiving the notice, the person or body who receives the notice shall notify the organization whether it objects to having the organization grant the individual's request for access.

Right to object

(5) The government of Canada, a province or territory of Canada or an agent of that government that received disclosure of the information may object to having the organization grant the individual's request for access only if of the opinion that granting the request could reasonably be expected to be injurious to the security or defence of Canada or the conduct of international affairs involving that government.

Same

(6) An investigative body who received disclosure of the information may object to having the organization grant the individual's request for access only if of the opinion that granting the request could reasonably be expected to be injurious to the enforcement of a law of Canada, a province or territory of Canada or a foreign jurisdiction or the gathering of intelligence for the purpose of enforcing that law.

Time of reply to request

(7) The organization shall not, under subsection 57 (3), respond to the individual's request for access until the earlier of,

(a) the day on which it receives notification of an objection made under subsection (5) or (6); or

(b) 30 days from the time of giving the notice described in subsection (3).

Refusal of access

(8) If a person or body, under subsection (5) or (6), objects to having the organization grant the individual's request for access, the organization shall not grant the individual access to the requested personal information.

Notice of request affecting third party

(9) If an organization receives a request under section 57 for access to personal information about an individual, if granting the request would likely reveal personal information of another individual and if it is not possible to sever the requested information from the personal information of the other individual, the organization shall send a written notice to that other individual containing,

(a) a statement that the organization has received a request for access to personal information where granting the request would likely reveal personal information of that other individual;

(b) a description of the personal information requested; and

(c) a statement that the organization will not grant the request for access if that other individual does not consent to the granting of access.

Procedure for access

57. (1) To exercise a right to access to personal information under subsection 56 (1) or (2), including information on its use and disclosure, an individual shall make a written request for access to the organization that has custody or control of the information.

Assistance

(2) If the individual requests the organization for help in preparing the request for access, the organization shall help the individual.

Response to request

(3) Subject to subsection (4), as soon as possible in the circumstances but no later than 30 days after receiving the request, the organization shall,

(a) grant the individual access to the requested personal information in a generally understandable format unless the organization believes, on reasonable grounds, that the individual is not entitled under this Act to access to the information;

(b) give a written notice to the individual stating that the organization does not have custody or control of the requested personal information, if that is the case, and specifying the identity of the organization that has custody or control of the information, if that is known; or

(c) give a written notice to the individual stating that the organization is refusing the request, in whole or in part, specifying the reason for the refusal and stating that the individual is entitled to make a complaint about the refusal to the Commissioner.

Extension of time

(4) Within 30 days after receiving the request, the organization may extend the time limit set out in subsection (3) for a further period of time of not more than 30 days if,

(a) meeting the time limit would unreasonably interfere with the activities of the organization; or

(b) the time required to undertake the consultations necessary to reply to the request would make it not reasonably practical to meet the time limit.

Notice of extension

(5) If the organization extends the time limit, the organization shall give the individual a written notice of the extension before the time limit set out in subsection (3) expires that sets out the length of the extension and the reason for the extension.

Frivolous or vexatious requests

(6) An organization that reasonably believes that a request for access to personal information is frivolous or vexatious or made in bad faith may refuse to grant the individual access to the requested information.

Refusal to confirm or deny

(7) An organization that does not grant an individual access to personal information under this section because it believes, on reasonable grounds, that the individual is not entitled under clause 56 (1) (a), (b), (c) or (f) to access to the information may state in the notice that it is required to give under clause (3) (c) that it refuses to confirm or deny that the information exists.

Effect of non-compliance

(8) If the organization does not reply to the request within the time limit or before the extension, if any, expires, the organization shall be deemed to have refused the individual's request for access.

Right to complain

(9) If the organization refuses or is deemed to have refused the request, in whole or in part, the individual is entitled to make a complaint about the refusal to the Commissioner under Part VI.

Identity of individual

(10) An organization shall not grant an individual access to personal information under this section without first taking reasonable steps to be satisfied as to the individual's identity.

Duty to sever

(11) If, under subsection 56 (1) or (2), the individual is not entitled to some of the personal information to which the individual requests access, the organization shall sever the information to which the individual is not entitled from the rest of the information and grant the individual access to the rest of the information.

Fee for access

(12) As a condition of granting the access to personal information that an individual requests under this section, an organization may require the individual to pay a reasonable cost recovery fee determined in accordance with the regulations if,

(a) it informs the individual of the approximate amount of the fee before granting the access;

(b) within a reasonable time of receiving the information mentioned in clause (a), the individual does not notify the organization that he or she withdraws the request; and

(c) the organization has not used the personal information to deny the individual a benefit or to increase any charge that the organization imposes on the individual in dealing with the individual.

Waiver of fees for access

(13) The organization shall waive the payment of all or part of the fee where the organization determines that it is fair and equitable to do so after considering,

(a) whether the payment will cause financial hardship for the applicant; and

(b) all other matters that are prescribed.

Copy of record

(14) If an organization grants an individual access to personal information under this section and if the organization has made a record of the information, it shall, at the time of granting the access, give the individual a copy of the record or an opportunity to examine the record.

Same

(15) If, after exercising an opportunity to examine the record under subsection (14), the individual requests a copy of part or all of the record, the organization shall give the individual a copy of those portions of the record that it would be reasonably practical to reproduce, given their length and nature.

Alternative format

(16) If an individual with a disability, in a request for access to personal information under this section, requests that the organization provide the access in an alternative format and if the organization grants the request for access, it shall, at the time of granting that request, provide the individual with access to the information, and if applicable the copy of a record of the information, in that format if,

(a) a version of the information already exists in that format; or

(b) it is reasonably necessary for the individual to have access to the information in that format in order to exercise rights under this Part.

Information on uses and disclosures

(17) If an individual, in a request for access to personal information under this section, requests that the organization give the individual information on the uses and disclosures that the organization has made of the requested personal information and if the organization grants the request for access, the organization shall, at the time of granting the access, give the individual the information on the uses and disclosures.

PERSONAL HEALTH INFORMATION WITH A HEALTH INFORMATION CUSTODIAN

Individual's right of access

58. (1) Subject to this Part, an individual is entitled, in accordance with this Part, to access to a record of personal health information about the individual that is in the custody or under the control of a health information custodian unless,

(a) the information is quality of care information;

(b) the information was collected or created in the course of conducting a quality assurance program within the meaning of the Health Professions Procedural Code that is Schedule 2 to the *Regulated Health Professions Act, 1991*;

(c) the information, under the *Regulated Health Professions Act, 1991*, is not admissible in evidence in a civil proceeding;

(d) the information is in the custody or under the control of a health information custodian described in paragraph 7 or 8 of the definition of "health information custodian" in section 2;

(e) granting the access is prohibited by another Act;

(f) the information was collected or created in the course of an inspection, investigation or similar procedure that was authorized by law or that was undertaken primarily in anticipation of or use in a proceeding;

(g) granting the access could reasonably be expected to interfere with an inspection, investigation or similar procedure authorized by law;

(h) the information was collected or created in the course of an inspection, investigation or similar procedure undertaken for the purpose of the detection, monitoring or prevention of,

(i) a person's receiving or attempting to receive a payment for a service or benefit to which the person is not entitled under an Act, regulation or program operated by the Minister, or

(ii) a person's receiving or attempting to receive a service or benefit to which the person is not entitled to under an Act, regulation or program operated by the Minister; or

(i) granting the access could reasonably be expected to interfere with an inspection, investigation or similar procedure described in clause (h).

No access

(2) An individual is not entitled to access to any part of a record of personal health information about the individual that is in the custody or under the control of a health information custodian if,

(a) the part of the record is raw data from standardized psychological tests or assessments;

(b) granting the access could reasonably be expected to,

(i) result in serious harm to the treatment or recovery of the individual, serious emotional harm to the individual or another individual or serious bodily harm to another individual, or

(ii) reveal the identity of an individual who supplied the information in the record to the custodian, as required by law; or

(c) the following conditions are met:

1. The custodian is an institution within the meaning of the *Freedom of Information and Protection of Privacy Act* or the *Municipal Freedom of Information and Protection of Privacy Act*.

2. The custodian would refuse to grant access to the part of the record,

i. under clause 49 (a), (c) or (e) of the *Freedom of Information and Protection of Privacy Act*, if the request were made under that Act and that Act applied to the record, or

ii. under clause 38 (a) or (c) of the *Municipal Freedom of Information and Protection of Privacy Act*, if the request were made under that Act and that Act applied to the record.

Informal access

(3) Nothing in this Part prevents a health information custodian from,

(a) granting an individual access to a record of personal health information, to which the individual is entitled to access, if the individual makes an oral request for access or does not make any request for access under section 59; or

(b) communicating with an individual with respect to a record of personal health information, to which the individual is entitled to access.

Request for access

59. (1) To exercise a right of access to a record of personal health information, an individual or an authorized person acting on behalf of the individual shall make a written request for access to the health information custodian that has custody or control of the information.

Detail in request

(2) To the extent possible, the request shall contain sufficient detail to enable the health information custodian to identify and locate the record with reasonable efforts.

Assistance

(3) If the individual requests the health information custodian for help in preparing the request for access, the custodian shall help the individual.

Abandoned request

(4) If the health information custodian contacts the applicant in writing with respect to the applicant's request for access and the applicant does not respond to the custodian, as requested by the custodian, within 30 days of being contacted, the custodian may, by notice in writing to the applicant, declare the request for access abandoned.

Meaning of "contact"

(5) A contact mentioned in subsection (4) may include,

(a) seeking further information from the applicant that is necessary to respond to the request; or

(b) requesting the applicant to pay a fee described in subsection (6) or to agree to pay that fee.

Fee for access

(6) As a condition of granting the access to personal health information that an individual requires under this section, a health information custodian may require the individual to pay a reasonable cost recovery fee determined in accordance with the regulations if the health information custodian informs the individual of the approximate amount of the fee before granting the access.

No fee payable

(7) No fee is payable if, within a reasonable time of receiving the information mentioned in subsection (6), the individual notifies the health information custodian that he or she withdraws the request.

Waiver of payment

(8) The health information custodian shall waive the payment of all or part of the fee if the custodian is of the opinion that it is fair and equitable to do so after considering

(a) whether the payment will cause financial hardship for the applicant; and

(b) all other matters that are prescribed.

Response of health information custodian

60. (1) Subject to subsection (5), a health information custodian that receives a request from an individual for access to a record of personal health information shall,

(a) make the record available to the individual for examination and, at the request of the individual, provide a copy of the record to the individual and if reasonably practical, an explanation of any term, code or abbreviation used in the record;

(b) give a written notice to the individual stating that the record does not exist or cannot be found, if that is the case; or

(c) if the custodian is entitled to refuse the request, in whole or in part, give a written notice to the individual stating that the custodian is refusing the request, in whole or in part, and stating that the individual is entitled to make a complaint about the refusal to the Commissioner under Part VI.

Time for response

(2) Subject to subsection (3), the health information custodian shall give the response required by clause (1) (a), (b) or (c) as soon as possible in the circumstances but no later than 30 days after receiving the request.

Extension of time for response

(3) Within 30 days after receiving the request for access, the health information custodian may extend the time limit set out in subsection (2) for a further period of time of not more than 30 days if,

(a) meeting the time limit would unreasonably interfere with the operations of the custodian because the information consists of numerous pieces of information or locating the information would necessitate a lengthy search; or

(b) consultations with a person who is not employed by or acting for or on behalf of the custodian are necessary to comply with the request and cannot reasonably be completed within the time limit.

Notice of extension

(4) Upon extending the time limit under subsection (3), the health information custodian shall give the person who made the request written notice of the extension setting out the length of the extension and the reason for the extension.

Mental Health Act

(5) This section does not apply, and sections 35 and 36 of the *Mental Health Act* apply, if the health information custodian mentioned in this section is the officer in charge of the facility within the meaning of the *Mental Health Act*, and the individual making the request is a patient within the meaning of that Act.

Frivolous or vexatious requests

(6) A health information custodian that reasonably believes that a request for access to a record of personal information is frivolous or vexatious or made in bad faith may refuse to grant the individual access to the requested record.

Effect of non-compliance

(7) If the health information custodian does not respond to the request within the time limit or before the extension, if any, expires, the custodian shall be deemed to have refused the individual's request for access.

Right to complain

(8) If the health information custodian refuses or is deemed to have refused the request, in whole or in part, the individual is entitled to make a complaint about the refusal to the Commissioner under Part VI.

Identity of individual

(9) A health information custodian shall not grant an individual access to a record of personal health information under this section without first taking reasonable steps to be satisfied as to the individual's identity.

Duty to sever

(10) If, under section 58, the individual is not entitled to a part of the record of personal health information to which the individual requests access, the health information custodian shall sever the part of the record to which the individual is not entitled to access and grant the individual access to the rest of the record.

Test for harm

61. (1) Subject to subsection (3), if,

(a) a health information custodian receives a request for access to a record of personal health information; and

(b) the custodian, upon the advice of a person described in subsection (2), where the custodian is not such a person, is of the opinion that granting access to the individual could reasonably be expected to result in serious harm to the treatment or recovery of the individual, serious emotional harm to the individual or another individual or serious bodily harm to another individual,

the custodian shall refuse to give the individual access to the record, or to that part of the record that could reasonably be expected to result in harm.

Person advising

(2) The person mentioned in clause (1) (b) shall be a physician registered with the College of Physicians and Surgeons or a psychologist.

Mental Health Act

(3) This section does not apply, and sections 35 and 36 of the *Mental Health Act* apply, if the health information custodian is the officer in charge of the facility within the

meaning of the *MentalHealth Act*, and if the person making a request for access is a patient within the meaning of that Act.

Where record cannot be severed

(4) Where granting access to part of the record is likely to have a result described in clause (1) (b), and it is not reasonably possible to sever that part from the rest, the custodian shall refuse to grant the individual access to all of the record.

Appeal to Board

(5) An individual who is refused access to his or her own record of personal health information under this section may appeal the decision of the custodian to the Board, in accordance with the prescribed terms and procedures.

GENERAL

This section applies to all organizations, including health information custodians.

Correction of personal information

62. (1) If an organization has granted an individual access to his or her personal information or to a record of his or her personal health information and if the individual believes that the information or the record, as the case may be, is inaccurate or incomplete, the individual may request in writing that the organization correct the information or the record, as the case may be.

Informal request

(2) If the individual makes an oral request that the organization correct the information or the record, as the case may be, nothing in this Part prevents the organization from making the requested correction.

Reply of organization

(3) As soon as possible in the circumstances but no later than 30 days after receiving the request mentioned in subsection (1), the organization shall reply to the individual's request or extend the deadline for replying for a period of not more than 30 days if,

(a) replying to the request within 30 days would unreasonably interfere with the activities of the organization; or

(b) the time required to undertake the consultations necessary to reply to the request within 30 days would make it not reasonably practical to reply within that time.

Duty to correct

(4) The organization shall grant the request if the individual demonstrates, to the satisfaction of the organization, that the information or the record is incomplete or inaccurate and gives the organization the information necessary to enable it to correct the information or the record, as the case may be, held by the organization.

Method of correction

(5) Upon granting the request, an organization that is not a health information custodian shall make the requested correction and give written notice to the individual of the correction.

Same, personal health information

(6) Upon granting the request, an organization that is a health information custodian shall,

(a) make the requested correction in the record of personal health information or, if that is not possible, sever the incorrect information from the record and store it separately from the record; and

(b) give written notice to the individual of what it has done under clause (a).

Notice to other organizations

(7) An organization that, within one year before receiving a request under subsection (1), has disclosed, or after receiving the request discloses, incomplete or inaccurate personal information to another organization shall give written notice to the recipient organization, within a reasonable period of time, of the corrections to be made to the personal information or the records of personal health information, as the case may be.

Duty of other organizations

(8) A recipient organization that is not a health information custodian shall make the corrections in the personal information that it holds.

Same, personal health information

(9) A recipient organization that is a health information custodian shall make the corrections in the records of personal information that it holds or, if that is not possible, shall sever the incorrect information from the records and store it separately from the records.

Frivolous or vexatious requests

(10) An organization that reasonably believes that the request is frivolous or vexatious may refuse the request.

Refusal of request

(11) An organization that refuses the request shall notify the individual in writing within a reasonable period of time that it is refusing the request and the individual may prepare a statement of disagreement that sets out the correction that the organization has refused to make.

Length of statement of disagreement

(12) The statement of disagreement shall not exceed 500 words or whatever other amount is prescribed.

Notice of refusal

(13) The notice of refusal must give the reasons for the refusal and inform the individual that the individual is entitled to,

(a) require that the organization attach the statement of disagreement to the records that it holds of the individual's personal information;

(b) require that the organization that is a health information custodian disclose the statement of disagreement to all organizations to which the custodian has disclosed an inaccurate or incomplete record of personal health information about the individual within one year of attaching the statement of disagreement to the records that the custodian holds of the individual's personal health information; and

(c) make a complaint about the refusal to the Commissioner under Part VI.

Rights of individual

(14) If the organization refuses the request, in whole or in part, the individual is entitled to take the actions described in any of clauses (13) (a), (b) and (c).

PART VI
ADMINISTRATION AND ENFORCEMENT

COMPLAINTS, REVIEWS AND INSPECTIONS

Complaint to Commissioner

Explanation:
Violations of this privacy legislation may come before the Information and Privacy Commissioner in two ways: (1) Someone makes a complaint to the Commissioner; or (2) The Commissioner learns about the activities of an organization through another source and has reasonable grounds to believe the organziation has or is about to contravene this Act. The Commissioner may, for example, act based on the privacy-invasive practices of an organization that one might read about in a newspaper.

Inspectors may be appointed by the Commissioner for reviews related to a complaint (s. 64(3)) or reviews of information practices (s.68). These inspectors are given a number of powers in s. 66(2) to enter premises, inquire into all relevant information, and demand the production of and make copies of records and documents. The Commissioner is also given a number of order-making powers in s. 69(1). These powers are similar to those of other regulatory regimes in the province and will help the Commissioner's Office to effectively perform its duties as regulator.

Questions:
Is the complaint process clear? Do you have any suggestions for its improvement?

Will the powers given to the Commissioner allow the legislation to be effectively enforced? Does the Commissioner's Office need further powers to fulfill its role? Do you think the Commissioner has been given too many powers?

63. (1) An individual or organization that has reasonable grounds to believe that an organization has contravened or is about to contravene a provision of this Act or the regulations may make a complaint to the Commissioner, except if the complaint relates to what constitutes quality of care information.

Time for complaint

(2) A complaint that an individual or organization makes under subsection (1) shall be in writing and shall be filed within two years after the subject-matter of the complaint first came to the attention of the complainant or should reasonably have come to the attention of the complainant, whichever is the shorter.

Same, refusal of request

(3) A complaint that an individual makes under subsection 57 (9), 60 (7) or 62 (14) shall be in writing and shall be filed within six months from the time at which the organization refuses or is deemed to have refused the individual's request mentioned in the applicable subsection.

Response of Commissioner

64. (1) Upon receiving a complaint made under subsection 63 (1), the Commissioner may,

(a) inquire as to what means, other than the complaint, that the complainant is using or has used to resolve the subject-matter of the complaint;

(b) require the complainant to try to effect a settlement, within the time period that the Commissioner specifies, with the organization about which the complaint is made; or

(c) authorize a mediator to review the complaint and to try to effect a settlement, within the time period that the Commissioner specifies, between the complainant and the organization about which the complaint is made.

Dealings without prejudice

(2) If the Commissioner takes an action described in clause (1) (b) or (c) but no settlement is effected within the time period specified,

(a) none of the dealings between the parties to the attempted settlement shall prejudice the rights and duties of the parties under this Act;

(b) none of the information disclosed in the course of trying to effect a settlement shall prejudice the rights and duties of the parties under this Act; and

(c) none of the information disclosed in the course of trying to effect a settlement shall be used outside the attempted settlement, including in a review of a complaint under this section or in an inspection under section 66 or 67, unless all parties expressly consent.

Commissioner's review

(3) The Commissioner may review the subject-matter of a complaint made under subsection 63 (1) if satisfied that there are reasonable grounds to do so and if,

(a) the Commissioner does not take an action described in clause (1) (b) or (c); or

(b) the Commissioner takes an action described in one of those clauses but no settlement is effected within the time period specified.

Same

(4) The Commissioner may review the subject-matter of a complaint made under subsection 57 (9), 60 (7) or 62 (14) if satisfied that there are reasonable grounds to do so.

No review

(5) The Commissioner may decide not to review the subject-matter of the complaint for whatever reason the Commissioner considers proper, including if satisfied that,

(a) it would have been more appropriate for the complainant, before making the complaint, to exhaust other grievance or review procedures otherwise reasonably available;

(b) the organization about which the complaint is made has responded adequately to the complaint;

(c) the complaint has been or could be more appropriately dealt with, initially or completely, by means of a procedure, other than a complaint under this Act, provided for under the laws of Canada or a province or territory of Canada;

(d) the length of time that has elapsed between the date when the subject-matter of the complaint arose and the date the complaint was made is such that an inspection under section 66 is not warranted; or

(e) the complaint is frivolous or vexatious or is made in bad faith.

Notice

(6) Upon deciding not to review the subject-matter of a complaint, the Commissioner shall give notice of the decision to the complainant and shall specify in the notice the reason for the decision if it is one described in one of the clauses of subsection (5).

Same

(7) Upon deciding to review the subject-matter of a complaint, the Commissioner shall give notice of the decision to the organization about whom the complaint is made.

Explanation:

When the Commissioner decides to review a complaint, s/he must notify the organization about which the complaint is made.

Question:

Should the Commissioner also be required to provide notice of the complaint to other parties that may be affected by the complaint?

Non-application

(8) The *Ombudsman Act* does not apply to any matter in respect of which a complaint may be made to the Commissioner under this Act or to the Commissioner or his or her employees or delegates acting under this section.

Conduct of review

(9) In conducting a review under this section, the Commissioner may make the rules of procedure that the Commissioner considers necessary and the *Statutory Powers Procedure Act* does not apply to the review.

Evidence

(10) In conducting a review under this section, the Commissioner may receive and accept any evidence and other information that the Commissioner sees fit, whether on oath or by affidavit or otherwise and whether or not it is or would be admissible in a court of law.

Burden of proof

(11) If the complaint is made under subsection 60 (7), the burden of proving in a review under this section that the refused individual is not entitled to access to a record of personal health information lies with the health information custodian that refused the access.

Inspectors

65. (1) The Commissioner or a person authorized in writing by the Commissioner may appoint any person or class of persons to be inspectors and may limit the powers of the inspectors in the document making the appointment.

Certificate of appointment

(2) Upon appointing an inspector, the Commissioner or a person authorized in writing by the Commissioner shall issue to the inspector a certificate of appointment bearing the Commissioner's signature or a facsimile of it.

Proof of appointment

(3) Every inspector who exercises powers under this Act shall, upon request, produce the certificate of appointment as an inspector.

Inspection without warrant

66. (1) If the Commissioner conducts a review under section 64 into a complaint, an inspector may, without warrant or court order, enter and inspect any premises in accordance with this section if,

(a) the inspector has reasonable grounds to believe that the organization about which the complaint was filed is using the premises for a purpose related to the subject-matter of the complaint; and

(b) the inspector is conducting the inspection for the purpose of determining whether the organization,

(i) has contravened or is about to contravene a provision of this Act or the regulations, in the case of a complaint filed under subsection 63 (1),

(ii) has unreasonably refused a request for access to personal information, in the case of a complaint filed under subsection 57 (9) or 60 (7), or

(iii) has unreasonably refused a request for correction of personal information, in the case of a complaint filed under subsection 62 (14).

Powers of inspector

(2) In an inspection under this section, an inspector may,

(a) demand the production of any books, records or other documents relevant to the subject-matter of the inspection or copies of extracts from the books, records or other documents;

(b) inquire into all information, records and other matters that are relevant to the subject-matter of the inspection;

(c) demand the production for inspection of anything described in clause (b);

(d) use any data storage, processing or retrieval device or system belonging to the persons being inspected in order to produce a record in readable form of any books, records or other documents relevant to the subject-matter of the inspection; or

(e) on the premises that the inspector has entered, review or copy any books, record or documents that a person produces to the inspector, if the inspector pays the reasonable cost recovery fee that the organization being inspected may charge.

Entry to dwellings

(3) An inspector shall not, without the consent of the occupier, exercise a power to enter a place that is being used as a dwelling, except under the authority of a search warrant issued under section 158 of the *Provincial Offences Act*.

Time for entry

(4) An inspector shall exercise the power to enter a premises under this section only during reasonable hours for the premises.

No obstruction

(5) No person shall obstruct an inspector who is exercising powers under this section or provide an inspector with false or misleading information.

Written demand

(6) A demand for books, records or documents or copies or extracts from them under subsection (2) shall be in writing and shall include a statement of the nature of the things that are required to be produced.

Obligation to assist

(7) If an inspector makes a demand for any thing under subsection (2), the person having custody of the thing shall produce it to the inspector and, at the request of the inspector, shall provide whatever assistance is reasonably necessary, including using any data storage, processing or retrieval device or system to produce a record in readable form, if the demand is for a document.

Removal of documents

(8) If a person produces books, records and other documents to an inspector, the inspector may, on issuing a written receipt, remove them and may,

(a) review or copy any of them, if the inspector is not able to review and copy them on the premises that the inspector has entered; or

(b) bring them before a justice of the peace, in which case section 159 of the *Provincial Offences Act* applies.

Return of documents

(9) The inspector shall carry out any reviewing or copying of things with reasonable dispatch, and shall forthwith after the reviewing or copying return the things to the person who produced them.

Admissibility of copies

(10) A copy certified by an inspector as a copy made under clause (8) (a) is admissible in evidence to the same extent, and has the same evidentiary value, as the thing copied.

Inspection with warrant

67. (1) If the Commissioner conducts a review under section 64 of a complaint, a justice of the peace may issue a warrant authorizing an inspector to enter the premises specified in the warrant and to exercise the powers mentioned in subsection 66 (2), if the justice of the peace is satisfied on information under oath that there are reasonable grounds to believe that something relevant to the subject-matter of the complaint exists in the premises, and,

(a) the inspector has been prevented from exercising a right of entry to the premises, or a power, under that subsection; or

(b) there are reasonable grounds to believe that the Commissioner will be prevented from exercising a right of entry to the premises, or a power, under that subsection.

Expiry of warrant

(2) The warrant shall name a date on which it expires, which date shall be no later that 30 days after the warrant is issued.

Extension

(3) A justice of the peace may extend the date on which the warrant expires to a date that is more than 30 days after the original expiry date, on an application without notice by the Commissioner.

Use of force

(4) The Commissioner may use whatever force is necessary to execute the warrant and may call on a police officer for assistance in executing the warrant.

Time of execution

(5) The warrant may be executed only between 8 a.m. and 8 p.m. unless it specifies otherwise.

Application of section 66

(6) Subsections 66 (2) to (10) apply with necessary modifications to the execution of a warrant under this section, unless the warrant specifies otherwise.

Review and inspection of information practices

68. (1) On giving reasonable notice in writing to an organization, the Commissioner may review the information practices of the organization if satisfied on reasonable grounds that the organization has contravened or is about to contravene a provision of this Act or the regulations.

Non-application

(2) The *Ombudsman Act* does not apply to a review by the Commissioner under this section or to the Commissioner or his or her employees or delegates acting under this section.

Conduct of review

(3) In conducting a review under this section, the Commissioner may make the rules of procedure that the Commissioner considers necessary and the *Statutory Powers Procedure Act* does not apply to the review.

Evidence

(4) In conducting a review under this section, the Commissioner may receive and accept any evidence and other information that the Commissioner sees fit, whether on oath or by affidavit or otherwise and whether or not it is or would be admissible in a court of law.

Inspection without warrant

(5) If the Commissioner conducts a review under this section, an inspector may, without warrant or court order, enter and inspect any premises in accordance with this section if,

(a) the inspector has reasonable grounds to believe that the organization whose information practices the Commissioner is reviewing is using the premises for a purpose related to the subject-matter of the review; and

(b) the inspector is conducting the inspection for the purpose of determining whether the organization has contravened or is about to contravene a provision of this Act or the regulations.

Application of section 66

(6) Subsections 66 (2) to (10) apply with necessary modifications to an inspection under subsection (5).

Inspection with warrant

(7) If the Commissioner conducts a review under this section, a justice of the peace may issue a warrant authorizing an inspector to enter the premises specified in the warrant and to exercise the inspector's powers on an inspection under subsection (5), if

the justice of the peace is satisfied on information under oath that there are reasonable grounds to believe that something relevant to the subject-matter of the review exists in the premises, and,

(a) the inspector has been prevented from exercising a right of entry to the premises, or a power, under that inspection; or

(b) there are reasonable grounds to believe that the Commissioner will be prevented from exercising a right of entry to the premises, or a power, under that inspection.

Application of other provisions

(8) Subsections 66 (2) to (10) and subsections 67 (2) to (5) apply with necessary modifications to the execution of a warrant under subsection (7), unless the warrant specifies otherwise.

Powers of Commissioner

69. (1) After conducting a review under section 64 of a complaint or a review under section 68 of information practices, the Commissioner may,

(a) make comments and recommendations on the privacy protection implications of any matter that is the subject of the complaint or the review of information practices;

(b) make an order directing any organization affected by the complaint or any other person to cease collecting, using or disclosing personal information if the Commissioner determines that the organization is collecting, using or disclosing the information, as the case may be, or is about to do so in contravention of this Act, the regulations or an agreement entered into under this Act;

(c) make an order directing any organization affected by the complaint or any other person to dispose of records of personal information that the Commissioner determines the organization collected, used or disclosed in contravention of this Act, the regulations or an agreement entered into under this Act;

(d) make an order directing any organization affected by the complaint or the organization whose information practices the Commissioner has reviewed to change, cease or not commence an information practice specified by the Commissioner, if the Commissioner determines that the information practice contravenes this Act or the regulations;

(e) make an order directing any organization affected by the complaint or the organization whose information practices the Commissioner has reviewed to implement an information practice specified by the Commissioner, if the Commissioner determines that the information practice is reasonably necessary in order to achieve compliance with this Act and the regulations;

(f) make an order directing any organization affected by the complaint or the organization whose information practices the Commissioner has reviewed to perform a duty imposed by this Act or the regulations;

(g) make an order directing the organization affected by a complaint, that relates to a request by an individual under subsection 57 (1) for access to personal information, to grant the individual access to the requested information;

(h) make an order directing the organization affected by a complaint, that relates to a request by an individual under subsection 59 (1) for access to a record of personal health information, to grant the individual access to the requested record;

(i) make an order directing the organization affected by a complaint that relates to a request by an individual for correction of personal information or a record of personal health information to make the requested correction.

Copy of order, etc.

(2) Upon making comments, recommendations or an order under subsection (1), the Commissioner shall provide a copy of them to,

(a) the complainant and the organization about which the complaint was filed, if the Commissioner made the comments, recommendations or order after conducting a review under section 64 of a complaint;

(b) the organization whose information practices the Commissioner reviewed, if the Commissioner made the comments, recommendations or order after conducting a review under section 68 of information practices;

(c) all other persons to whom the order is directed;

(d) the body or bodies that are legally entitled to regulate or review the activities of the persons directed in the order or to whom the comments or recommendations relate; and

(e) any other person whom the Commissioner considers appropriate.

Notice with order

(3) Upon making an order under subsection (1), the Commissioner shall include, with the copy of it described in subsection (2), a notice setting out,

(a) the findings on which the Commissioner bases the order and the reasons for making the order; and

(b) a statement that the persons affected by the order have the right to appeal described in section 70.

No order

(4) If, after conducting a review under section 64 of a complaint, the Commissioner does not make an order under subsection (1), the Commissioner shall give the complainant and the organization about which the complaint was filed a notice that,

(a) sets out the Commissioner's findings as a result of the review; and

(b) describes the settlement, if any, made by the complainant and the organization about which the complaint is filed.

Same

(5) If, after conducting a review under section 68 of the information practices of an organization, the Commissioner does not make an order under subsection (1), the Commissioner shall give the organization a notice that sets out the Commissioner's findings as a result of the review.

Appeal of order

Explanation:
According to the section below, appeals of orders can be made by the organization against which the Commissioner has made an order, or a complainant who is unsatisfied with the order. These appeals can be made on questions of law, but not on questions of fact.

Questions:
Should any other parties be allowed to appeal an order, such as, other companies who may be affected by the order?

Are you satisfied with this appeal process or do you have any suggested improvements to it?

70. (1) An individual or organization affected by an order of the Commissioner made under subsection 69 (1) may appeal the order to the Divisional Court on a question of law in accordance with the rules of court by filing a notice of appeal within 30 days of receiving the copy of the order.

Certificate of Commissioner

(2) The Commissioner shall certify to the Divisional Court,

(a) the order and a statement of the Commissioner's reasons for making the order;

(b) the record of all hearings that the Commissioner has held in conducting the inspection on which the order is based;

(c) all written submissions that the Commissioner received before making the order; and

(d) all other material that the Commissioner considers is relevant to the appeal.

Right of Commissioner

(3) The Commissioner is entitled to be heard, by counsel or otherwise, upon the argument of an appeal under this section.

Confidentiality of information

(4) In an appeal under this section, the court shall take every reasonable precaution, including, where appropriate, receiving representations without notice or conducting hearings in private, to avoid the disclosure by the court or any person of any personal information about an individual.

Court order

(5) On hearing an appeal under this section, the court may, by order,

(a) direct the Commissioner to make the decisions and to do the acts that the Commissioner is authorized to do under this Act and that the court considers proper; and

(b) if necessary, vary or set aside the Commissioner's order.

Compliance by Commissioner

(6) The Commissioner shall comply with the court's order.

Enforcement of order

Explanation:

Once the appeal rights have been exhausted, an order of the Commissioner may be filed with the court and would then become enforceable like a court judgment.

Question:
Do you agree with this approach to enforcing the Commissioner's orders?

71. An order made by the Commissioner under this Act that has become final as a result of there being no further right of appeal may be filed with the Superior Court of Justice and on filing becomes and is enforceable as a judgment or order of the Superior Court of Justice to the same effect.

Further order of Commissioner

72. (1) After making an order under subsection 69 (1) relating to a complaint or information practices, the Commissioner may rescind or vary the order or may make a further order under that subsection if new facts relating to the complaint or the information practices, as the case may be, come to the Commissioner's attention or if there is a material change in the circumstances relating to the complaint or the information practices, as the case may be.

Circumstances

(2) The Commissioner may exercise the powers described in subsection (1) even if the court makes an order on an appeal under section 70 or if the order that the Commissioner rescinds or varies has been filed with the Superior Court of Justice under section 71.

Copy of order, etc.

(3) Upon making an order under subsection (1), the Commissioner shall provide a copy of it to the persons described in clauses 69 (2) (a) to (e) and shall comply with subsection 69 (3) with respect to the order.

Appeal

(4) A person to whom an order that the Commissioner rescinds, varies or makes under subsection (1) is directed may appeal the order to the Divisional Court on a question of law in accordance with the rules of court by filing a notice of appeal within 30 days of receiving the copy of the order and subsections 70 (2) to (6) apply to the appeal.

Damages for breach of privacy

Explanation:
A person who has suffered losses due to a violation of this Act may bring a legal action against the offending party in court to recover damages. Given the difficulty in placing a dollar figure on harm in some cases, MCBS felt it would be helpful to provide some guidance to the court when awarding damages.

Question:
In your opinion, are the factors listed below appropriate for a court to consider when making an award for damages?

Is this approach adequate to compensate people who have suffered losses due to violations of this Act?

73. (1) If the Commissioner has made an order under this Act that has become final as a result of there being no further right of appeal, an individual or individuals affected by the order may bring an action in the Superior Court of Justice for damages for actual harm that the plaintiffs have suffered as a result of the breach by an organization of obligations under this Act or the regulations.

Factors to consider

(2) In awarding damages, the court shall consider the factors that it considers just, including,

(a) whether the breach was intentional or inadvertent;

(b) the number of plaintiffs who suffered actual harm as a result of the breach;

(c) the steps, if any, that the organization has taken to mitigate the actual harm that the plaintiffs have suffered and the timing of those steps;

(d) if any, the loss of income from employment or other economic loss that the plaintiffs have suffered;

(e) if any, the humiliation or psychological damage that the plaintiffs have suffered;

(f) the duration of the actual harm that the plaintiffs have suffered.

COMMISSIONER

Powers

74. The Commissioner may,

(a) engage in or commission research into matters affecting the carrying out of the purposes of this Act;

(b) conduct public education programs and provide information concerning this Act and the Commissioner's role and activities;

(c) receive representations from the public concerning the operation of this Act;

(d) on the request of an organization, offer comment on the organization's actual or proposed information practices;

(e) assist in investigations and similar procedures conducted by a person who performs similar functions to the Commissioner under the laws of Canada or a province or territory of Canada, other than Ontario.

Delegation

75. (1) The Commissioner may in writing delegate any of the Commissioner's powers, duties or functions under this Act, including the power to make orders, to,

(a) the Assistant Commissioner for Personal Information (Information Technology) appointed under the *Freedom of Information and Protection of Privacy Act*, if the powers, duties or functions relate to activities involving personal information and information technology;

(b) the Assistant Commissioner for Personal Information (Non-Health) appointed under the *Freedom of Information and Protection of Privacy Act*, if the powers, duties or functions relate to personal information that is not personal health information;

(c) the Assistant Commissioner for Personal Health Information appointed under the *Freedom of Information and Protection of Privacy Act*, if the powers, duties or functions relate to personal health information; or

(d) an officer or employee of the Commissioner if there is no Assistant Commissioner for Personal Information (Non-Health) or Assistant Commissioner for Personal Health Information.

Subdelegation by Assistant Commissioner

(2) An Assistant Commissioner mentioned in clause (1) (a), (b) or (c) may in writing delegate any of the powers, duties or functions delegated to him or her under subsection (1) to any other officers or employees of the Commissioner, subject to the conditions and restrictions that the applicable Assistant Commissioner specifies in the delegation.

Exception, person

(3) The Assistant Commissioner for Personal Information (Information Technology), the Assistant Commissioner for Personal Information (Non-Health) and the Assistant Commissioner for Personal Health Information shall not delegate any powers, duties or functions to a Minister or the employees or agents in a Ministry.

Confidentiality

76. (1) The Commissioner, Assistant Commissioner for Personal Information (Information Technology), the Assistant Commissioner for Personal Information (Non-Health), the Assistant Commissioner for Personal Health Information and persons acting on behalf of or under the direction of any of them shall not disclose any information that comes to their knowledge in the course of exercising their functions under this Act unless,

(a) the disclosure is required for the purpose of exercising those functions;

(b) the information relates to a health information custodian, the disclosure is made to a body that is legally entitled to regulate or review the activities of the custodian and the person disclosing the information is of the opinion that the disclosure is justified;

(c) the disclosure is made to the Attorney General of Ontario, the information relates to the commission of an offence against an Act or regulation of Ontario, Canada or a province or territory of Canada and the Commissioner, the Assistant Commissioner for Personal Information (Non-Health) or the Assistant Commissioner for Personal Health Information, as the case may be, is of the opinion that there is evidence of such an offence;

(d) the disclosure is required in a prosecution for an offence under this Act or for an offence under section 131 of the *Criminal Code* (Canada) in respect of sworn testimony; or

(e) the disclosure is required in an application for judicial review or an appeal from a decision made by a court, tribunal or other person, including the Commissioner, in a proceeding with respect to that application.

Quality of care information

(2) Despite anything in subsection (1), the Commissioner, Assistant Commissioner for Personal Information (Information Technology), the Assistant Commissioner for Personal Information (Non-Health), the Assistant Commissioner for Personal Health Information and persons acting on behalf of or under the direction of any of them shall not disclose any quality of care information that comes to their knowledge in the course of exercising their functions under this Act.

Duty of recipient in proceeding

(3) A court or tribunal to which, or a person to whom, information is disclosed under clause (1) (e) shall keep the information in a sealed file that is not accessible to members of the public.

No requirement for disclosure

(4) Despite anything in this Part, the Commissioner, Assistant Commissioner for Personal Information (Information Technology), the Assistant Commissioner for Personal Information (Non-Health), the Assistant Commissioner for Personal Health Information and persons acting on behalf of or under the direction of any of them shall not disclose or require any other person to disclose, in the presence of a complainant or another party to a review under subsection 64 (3) or 68 (1) information that, under Part V, an organization should refuse to disclose if the organization had received an access request for it.

Not compellable witness

(5) The Commissioner, Assistant Commissioner for Personal Information (Information Technology), the Assistant Commissioner for Personal Information (Non-Health), the Assistant Commissioner for Personal Health Information and persons acting on behalf of or under the direction of any of them shall not be required to give evidence in a court or in a proceeding of a judicial nature concerning anything coming to their knowledge in the exercise of their functions under this Act that they are prohibited from disclosing under subsection (1), (2) or (4).

Immunity

77. No action or other proceeding for damages may be instituted against the Commissioner, Assistant Commissioner for Personal Information (Information Technology), the Assistant Commissioner for Personal Information (Non-Health), the Assistant Commissioner for Personal Health Information or any person acting on behalf of or under the direction of any of them for,

(a) anything done, reported or said in good faith in the exercise or intended exercise of their powers or duties under this Act that was reasonable in the circumstances; or

(b) any alleged neglect or default in the exercise in good faith of their powers or duties under this Act that was reasonable in the circumstances.

PART VII
MISCELLANEOUS

Non-retaliation

78. (1) A person who has reasonable grounds to believe that an organization has contravened or is about to contravene a provision of this Act or the regulations and who, in good faith, notifies the Commissioner in writing of the particulars of the matter, whether or not the person files a complaint under subsection 63 (1), may request that the Commissioner keep the person's identity confidential with respect to the notification.

Confidentiality

(2) The Commissioner shall comply with a request made under subsection (1).

Protection

(3) No organization shall dismiss, suspend, demote, discipline, harass or otherwise disadvantage a person who is one of its employees or agents or deny the person a benefit by reason that,

(a) the person, acting in good faith and on the basis of reasonable belief, has disclosed to the Commissioner that the organization or any other person has contravened or is about to contravene a provision of this Act or the regulations;

(b) the person, acting in good faith and on the basis of reasonable belief, has done or stated an intention of doing anything that is required to be done in order to avoid having any person contravene a provision of this Act or the regulations; or

(c) the organization believes that the person will do anything described in clause (a) or (b).

Offences

Explanation:

The Attorney General may prosecute a person for any of the offences listed in this section.

Questions:

Are there other offences that should be included in the list?

Should some proposed offences be removed from the list?

Are the penalties for being found guilty of an offence adequate?

79. (1) Subject to subsection (2), a person is guilty of an offence if the person,

(a) uses deception or coercion to collect, use or disclose personal information in contravention of this Act;

(b) obtains access or attempts to obtain access to personal information in bad faith where the person has reason to believe he or she is not entitled to the access;

(c) disposes of a record of personal information with an intent to evade a request for access to the record;

(d) in connection with the collection, use or disclosure of, or access to, personal health information makes an assertion, knowing that it is untrue, to the effect that the person,

(i) is a person entitled to access to a record of personal health information under section 58,

(ii) is a person who is entitled to consent to the collection, use or disclosure of personal health information about another individual,

(iii) meets the requirement of clauses 14 (2) (b) and (c), or

(iv) holds the beliefs described in subsection 14 (5);

(e) obstructs the Commissioner or an authorized delegate of the Commissioner in the performance of his or her duties or powers under this Act;

(f) knowingly makes a false statement to the Commissioner, or knowingly misleads or attempts to mislead the Commissioner, in the course of the Commissioner's performance of his or her duties or powers under this Act;

(g) fails to comply with an order made by the Commissioner under this Act; or

(h) contravenes subsection 78 (3).

Due diligence

(2) No person is guilty of an offence under this Act if in all the circumstances the person acted in the same manner as a reasonably prudent person would act in comparable circumstances.

Prosecution

(3) No person other than the Attorney General or a counsel or agent acting on behalf of the Attorney General may commence a prosecution for an offence under subsection (1).

Penalty

(4) A person who is guilty of an offence under subsection (1) is liable, on conviction,

(a) if the person is an individual, to a fine of not more than $50,000; and

(b) if the person is not an individual, to a fine of not more than $250,000.

Directors, officers, etc.

(5) If a corporation commits an offence under this Act, every director, officer, member, employee or agent of the corporation who authorized or acquiesced in the offence is a party to and guilty of the offence and is liable, on conviction, to the penalty for the offence, whether or not the corporation has been prosecuted or convicted.

No prosecution

(6) No person is liable to prosecution for an offence against this or any other Act by reason of complying with a requirement of the Commissioner under this Act.

Regulations

80. (1) The Lieutenant Governor in Council may make regulations,

(a) prescribing or specifying anything that this Act describes as being prescribed, specified, described or provided for in the regulations;

(b) exempting persons or classes of persons from the persons described in clause (d) of the definition of "health care practitioner" in section 2;

(c) specifying persons or classes of persons who shall not be included in the definition of "health information custodian" in section 2;

(d) specifying that certain types of information shall or shall not be included in the definition of "personal health information" in section 2;

(e) specifying persons or classes of persons who shall be included in the definition of "organization" in section 2;

(f) defining, for the purposes of this Act and the regulations, any word or expression used in this Act that has not already been expressly defined in this Act;

(g) exempting organizations or classes of organizations or health information custodians or classes of health information custodians from any provision of this Act or the regulations;

(h) making any provision of this Act or the regulations, that applies to some but not all health information custodians, applicable to a person described in paragraph 9 of the definition of "health information custodian" in section 2 or a member of a class described in paragraph 10 of that definition;

(i) specifying Acts or regulations made under Acts or parts of those Acts and regulations that, under subsection 5 (2), prevail over this Act and the regulations in the event of conflict;

(j) specifying situations where an individual may not withdraw consent to the collection, use or disclosure of personal information;

(k) specifying conditions, restrictions or requirements that apply with respect to the disclosure of personal health information under clause 37 (3) (a) or (b);

(l) specifying how a health data institute whose approval the Minister has revoked is required to deal with personal health information that is in the custody or under the control of the institute as a result of section 47 or 48;

(m) specifying requirements with respect to information practices for the purposes of subsection 53 (1);

(n) specifying circumstances in which an organization is exempt from acting in conformity with its information practices;

(o) prescribing and governing the obligations of health information custodians and others in relation to providing information about rights under this Act or assistance in exercising those rights, including specifying,

(i) the categories of persons who are to receive the information or assistance,

(ii) the circumstances in which the information or assistance is to be given,

(iii) the persons who are to give the information or assistance, and

(iv) the manner in which and the time at which the information or assistance is to be given;

(p) prescribing an amount or a method for determining an amount of the reasonable cost recovery fee mentioned in subsection 57 (12), including prescribing a different amount or a different method for determining the amount in the case of granting access to personal information in an alternative format than in the case of granting access to personal information not in an alternative format;

(q) permitting notices or other documents required to be given in writing under this Act to be given in electronic or other form instead, subject to the conditions or restrictions that are specified by the regulations;

(r) respecting any matter necessary or advisable to carry out effectively the purposes of this Act.

General or specific application

(2) A regulation may be of general application or specific to any person or persons or class or classes in its application.

Classes

(3) A class described in the regulations may be described according to any characteristic or combination of characteristics and may be described to include or exclude any specified member, whether or not with the same characteristics.

Adoption of codes

(4) A regulation may adopt by reference, in whole or in part, with the changes that the Lieutenant Governor in Council considers necessary, any code, formula, standard, guideline, protocol or procedure, and may require compliance with any code, formula, standard, guideline, protocol or procedure so adopted.

Amendments to codes

(5) The power to adopt by reference and require compliance with a code, formula, standard, guideline, protocol or procedure in subsection (4) includes the power to adopt a code, formula, standard, guideline, protocol or procedure as it may be amended from time to time after the regulation is made.

Review of Act

81. A committee of the Legislative Assembly shall begin a comprehensive review of this Act and the operation of the Commissioner's office in relation to this Act not later than the third anniversary of the day on which this section comes into force and, within one year after beginning that review, shall make recommendations to the Assembly concerning amendments to this Act.

PART VIII
ENACTMENT AND COMPLEMENTARY AMENDMENTS

Enactment of *Quality of Care Information Protection Act, 2002*

82. The *Quality of Care Information Protection Act, 2002*, as set out in the Schedule, is hereby enacted.

DRUG AND PHARMACIES REGULATION ACT

83. Section 157 of the *Drug and Pharmacies Regulation Act* is amended by adding the following subsection:

Subsection (1) prevails

(1.1) Subsection (1) applies despite anything to the contrary in the *Privacy of Personal Information Act, 2002*.

FREEDOM OF INFORMATION AND PROTECTION OF PRIVACY ACT

84. (1) Subsection 4 (4) of the *Freedom of Information and Protection of Privacy Act* is repealed and the following substituted:

Assistant Commissioners

(4) The Commissioner shall appoint, from the officers of the Commissioner's staff, an Assistant Commissioner for Personal Information (Information Technology), an Assistant Commissioner for Personal Information (Non-Health), an Assistant Commissioner for Personal Health Information and one or two other Assistant Commissioners.

(2) Subsection 58 (1) of the Act is repealed and the following substituted:

Annual report of Commissioner

(1) The Commissioner shall make an annual report to the Speaker of the Assembly in accordance with subsections (2) and (3) since the immediately preceding annual report.

(3) Section 58 of the Act is amended by adding the following subsections:

Same, personal health information

(3) A report made under subsection (1) shall include a report prepared in consultation with the Assistant Commissioner for Personal Information (Non-Health) and the Assistant Commissioner for Personal Health Information on the exercise of the Commissioner's powers and duties under the *Privacy of Personal Information Act, 2002*, including,

(a) information related to the number and nature of complaints received by the Commissioner under section 63 of that Act and the disposition of them;

(b) information related to the number and nature of reviews conducted by the Commissioner under section 68 of that Act and the disposition of them;

(c) all other information prescribed by the regulations made under that Act; and

(d) all other matters that the Commissioner considers appropriate.

Tabling

(4) The Speaker shall cause the annual report to be laid before the Assembly if it is in session or shall deposit the report with the Clerk of the Assembly if the Assembly is not in session.

(4) Section 59 of the Act is amended by adding the following clause:

(a.1) upon the request of an institution, provide advice on the privacy implications of government inititiatives and projects.

HEALTH PROTECTION AND PROMOTION ACT

85. (1) Subsection 11 (2) of the *Health Protection and Promotion Act* is repealed and the following substituted:

Report

(2) The medical officer of health shall report the results of the inspection to the complainant, but shall not include in the report personal health information within the meaning of the *Privacy of Personal Information Act, 2002* in respect of a person other than the complainant, unless consent to the disclosure is obtained in accordance with that Act.

Obligation prevails

(3) The obligation imposed on the medical officer of health under subsection (2) applies despite anything to the contrary in the *Privacy of Personal Information Act, 2002*.

(2) Section 86.2 of the Act, as enacted by the Statutes of Ontario, 1997, chapter 30, Schedule D, section 11, is amended by adding the following subsection:

Subsection (3) prevails

(4) Subsection (3) applies despite anything to the contrary in the *Privacy of Personal Information Act, 2002*.

PUBLIC HOSPITALS ACT

86. (1) Section 1 of the *Public Hospitals Act*, as amended by the Statutes of Ontario, 1996, chapter 1, Schedule F, section 3 and 1998, chapter 18, Schedule G, section 70, is further amended by adding the following definition:

"personal health information" has the same meaning as in the *Privacy of Personal Information Act, 2002*; ("renseignements personnels sur la santé")

(2) Subsection 14 (1) of the Act is amended by striking out "medical record" and substituting "record of personal health information".

(3) Subsection 14 (2) of the Act, as enacted by the Statutes of Ontario, 1996, chapter 1, Schedule F, section 12, is amended by striking out "medical records" and substituting "records of personal health information".

(4) Subclause 32 (1) (t) (iv) of the Act, as re-enacted by the Statutes of Ontario, 1996, chapter 1, Schedule F, section 14, is amended by striking out "medical records" and substituting "records of personal health information".

(5) Clause 32 (1) (u) of the Act, as re-enacted by the Statutes of Ontario, 1996, chapter 1, Schedule F, section 14, is amended by striking out "medical records" and substituting "records of personal health information".

REMEDIES FOR ORGANIZED CRIME AND OTHER UNLAWFUL ACTIVITIES ACT, 2001

87. (1) Subsection 19 (8) of the *Remedies for Organized Crime and Other Unlawful Activities Act, 2001* is amended by striking out "a person shall not disclose" and substituting "a health information custodian shall not disclose".

(2) The definitions of "health care", "personal support service" and "registration information" in subsection 19 (10) of the Act are repealed.

(3) Subsection 19 (10) of the Act is amended by adding the following definition:

"health information custodian" has the same meaning as in the *Privacy of Personal Information Act, 2002*; ("dépositaire de renseignements sur la santé")

(4) The definition of "personal health information" in subsection 19 (10) of the Act is repealed and the following substituted:

"personal health information" has the same meaning as in the *Privacy of Personal Information Act, 2002*; ("renseignements personnels sur la santé")

PART IX
COMMENCEMENT AND SHORT TITLE

Commencement

88. (1) This Act comes into force on a day to be named by proclamation of the Lieutenant Governor.

Schedule

(2) The Schedule to this Act comes into force as provided in the commencement section at or near the end of the Schedule.

Selective proclamation

(3) A proclamation mentioned in subsection (1) may apply to one or more sections, subsections, clauses or paragraphs of this Act or to one or more other subdivisions of any section of this Act, and proclamations may be issued at different times under this subsection.

Short title

89. The short title of this Act is the *Privacy of Personal Information Act, 2002*.

SCHEDULE
QUALITY OF CARE INFORMATION PROTECTION ACT, 2002

Explanation:
This Act, modelled on approaches in other provinces, is intended to encourage health professionals and institutions to hold frank discussions to improve patient care. To do this, information arising from these discussions is shielded from being disclosed in other contexts.

Question:
Are the provisions in this Act appropriate and effective for achieving this quality of care mandate? Do you have any suggestions for improving upon this proposed bill?

Definitions

1. (1) In this Act,

"disclose" means, with respect to quality of care information, to provide or make the information available to a person who is not a member of the quality of care committee with which the information is associated, and "disclosure" has a corresponding meaning; ("divulguer", "divulgation")

"health care" means any observation, examination, assessment, care, service or procedure that is done for a health-related purpose and that,

(a) is carried out or provided to diagnose, treat or maintain an individual's physical or mental condition,

(b) is carried out or provided to prevent disease or injury or to promote health, or

(c) is carried out or provided as part of palliative care,

and includes,

(d) the compounding, dispensing or selling of a drug, a device, equipment or any other item to an individual, or for the use of an individual, pursuant to a prescription, and

(e) a community service that is described in subsection 2 (3) of the *Long-Term Care Act, 1994* and provided by a service provider within the meaning of that Act; ("soins de santé")

"hospital" means a hospital approved as a public hospital under the *Public Hospitals Act* or a private hospital within the meaning of the *Private Hospitals Act*; ("hôpital")

"information" includes personal information and personal health information, as defined in the *Privacy of Personal Information Act, 2002*; ("renseignements")

"proceeding" includes a proceeding held in, before or under the rules of a court, a tribunal, a commission, a justice of the peace, a coroner, a committee of a College within the meaning of the *Regulated Health Professions Act, 1991*, a committee of the Board of Regents continued under the *Drugless Practitioners Act*, a committee of the Ontario College of Social Workers and Social Service Workers under the *Social Work and Social Service Work Act, 1998* or an arbitrator or mediator in a proceeding; ("instance")

"quality of care committee" means a body of one or more individuals,

(a) that is established, appointed or approved,

(i) by a hospital, or

(ii) by an entity prescribed by the regulations that provides health care or by an entity that is in a class of entities prescribed by the regulations that provide health care,

(b) whose purpose is,

(i) to improve the quality of health care provided by the hospital or the entity, or

(ii) to educate individuals who provide the health care, and

(c) whose functions are to examine and evaluate the provision of health care to individuals by the hospital or the entity by methods that may include a quality assurance review, error and risk management review, peer review, ethics review, utilization review, outcome review and medical and other professional review; ("comité de la qualité des soins")

"witness" means a person, whether or not a party to a proceeding, who, in the course of the proceeding,

(a) is examined for discovery, either orally or in writing,

(b) makes an affidavit, or

(c) is competent or compellable to be examined or to produce a document, whether under oath or not. ("témoin")

Quality of care information

(2) For the purposes of this Act, information is quality of care information if,

(a) it is collected by or prepared for a quality of care committee for the sole purpose of assisting the committee in carrying out its functions;

(b) it arises out of any activity that a quality of care committee carries on as part of its functions; or

(c) it is information that satisfies the criteria for quality of care information prescribed by the regulations.

Exception

(3) Despite subsection (2), quality of care information does not include the following:

1. Information collected or used for the purposes of providing health care to an individual.

2. Information prescribed by the regulations not to be quality of care information.

Disclosure to committee

2. Despite the provisions of this Act and the *Privacy of Personal Information Act, 2002*, a person may disclose any information to a quality of care committee for the purposes of the committee.

Non-disclosure of information

3. (1) Despite the *Privacy of Personal Information Act, 2002*, no person shall do any of the following, except as permitted by this Act:

1. Disclose information concerning any activity carried on by a quality of care committee as part of its functions.

2. Disclose quality of care information.

Exception, quality of care committee

(2) Despite subsection (1) and the *Privacy of Personal Information Act, 2002*, a quality of care committee may disclose quality of care information to the management of the hospital or entity that established, appointed or approved the committee, if the committee considers the disclosure necessary for the purposes of eliminating or reducing a substantial risk of serious bodily harm to individuals who receive services from the hospital or entity.

Exception, any person

(3) Despite subsection (1) and the *Privacy of Personal Information Act, 2002*, a person may disclose information about an individual, including quality of care information, without the individual's consent if the disclosure is necessary for the purposes of eliminating or reducing a substantial risk of serious bodily harm to an identifiable individual or group of individuals.

Use of information

(4) A person to whom information is disclosed for the purposes set out in subsection (2) or (3) shall not use the information except for the purposes for which the information was disclosed to the person.

Disclosure of information

(5) A person to whom information is disclosed for the purposes set out in subsection (2) or (3) shall not disclose the information except as permitted under this Act.

Non-disclosure in proceeding

4. (1) Except as permitted by this Act, no person shall ask a witness and no court or other body holding a proceeding, other than a quality of care committee, shall permit or require a witness in the proceeding to,

(a) disclose information concerning any activity carried on by a quality of care committee as part of its functions; or

(b) disclose quality of care information.

Non-admissibility of evidence

(2) Except as permitted by this Act, no quality of care information is admissible in evidence in a proceeding.

Offence

5. (1) Every person who contravenes section 3 is guilty of an offence.

Same

(2) Every person who knowingly asks a witness in a proceeding to disclose information or make a statement concerning any activity carried on by a quality of care committee as part of the committee's functions or who knowingly asks a witness in a proceeding to disclose quality of care information, contrary to subsection 4 (1), is guilty of an offence.

Prosecution

(3) No person other than the Attorney General or a counsel or agent acting on behalf of the Attorney General may commence or conduct a prosecution for an offence under subsection (1) or (2).

Penalty

(4) A person who is guilty of an offence under subsection (1) or (2) is liable, on conviction,

(a) to a fine of not more than $50,000, if the person is an individual; or

(b) to a fine of not more than $250,000, if the person is not an individual.

Directors, officers, etc.

(5) If a corporation is guilty of an offence under this Act, every director, officer, member, employee or agent of the corporation who directed, authorized, assented to, acquiesced in or participated in the commission of the offence is a party to and guilty of the offence and is liable on conviction to the penalty for the offence, whether or not the corporation has been prosecuted or convicted.

Immunity

6. (1) No action or other proceeding for damages may be instituted against a person who in good faith discloses information to a quality of care committee at the request of the committee or for the purposes of assisting the committee in carrying out its functions.

Same, committee member

(2) No action or other proceeding for damages and no prosecution for an offence under section 5 may be instituted against,

(a) a member of a committee who, in good faith, discloses quality of care information for a purpose described in subsection 3 (2); or

(b) a person who, in good faith, discloses information for a purpose described in subsection 3 (3).

Same, failure to disclose

(3) No action or other proceeding for damages may be instituted against a member of a committee in respect of the failure of the committee to make a disclosure referred to in subsection 3 (2).

Regulations

7. (1) The Lieutenant Governor in Council may make regulations,

(a) defining any term used in this Act that is not defined in this Act;

(b) prescribing criteria for information that is quality of care information;

(c) prescribing information that is not quality of care information.

Minister's regulations

(2) The Minister of Health and Long-Term Care may make regulations,

(a) prescribing entities or classes of entities for the purposes of the definition of "quality of care committee" in subsection 1 (1);

(b) governing procedures to be followed by a quality of care committee relating to quality of care information.

Same

(3) A regulation made under clause (2) (b) may prescribe different procedures for different classes of quality of care information or for different classes of quality of care committees.

Ministerial responsibility

8. This Act shall be administered by the Minister of Health and Long-Term Care.

Commencement

9. This Schedule comes into force on the earlier of,

(a) a day to be named by proclamation of the Lieutenant Governor; and

(b) the day section 58 of the *Privacy of Personal Information Act, 2002* comes into force.

Short title

10. The short title of the Act set out in this Schedule is the *Quality of Care Information Protection Act, 2002*.